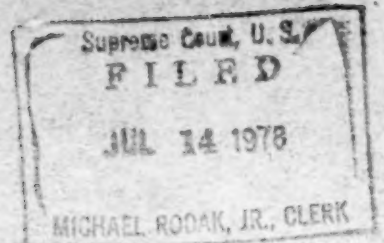


APPENDIX



In the Supreme Court of the United States

OCTOBER TERM 1978

No. 77-6067

BILLY DUREN

vs

THE STATE OF MISSOURI

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI**

**PETITION FOR CERTIORARI
FILED JANUARY 19, 1978
CERTIORARI GRANTED MAY 1, 1978**

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RELEVANT DOCKET ENTRIES

1. October 3, 1975. Indictment filed in Jackson County, Missouri Circuit Court charging Petitioner with Murder, First Degree and Assault With Intent To Kill With Pistol With Malace Aforethought.
2. October 8, 1975. Petitioner arraigned in Jackson County, Missouri Circuit Court, entering pleas of not guilty to both counts of the indictment.
3. February 4, 1976. Petitioner's amended Motion to Quash Jury Panel filed.
4. March 29, 1976. Hearing on Petitioner's amended Motion to Quash Jury Panel held: Exhibits One through Four admitted into evidence. State presented no evidence. Petitioner's amended Motion to Quash Jury Panel overruled.
5. March 31, 1976. Jury returns verdicts of guilt as to both counts.
6. April 14, 1976. Motion for New Trial filed.
7. April 21, 1976. Hearing on Motion for New Trial. Defense Exhibits One through Five admitted into evidence. Motion for New Trial overruled. Petitioner sentenced to consecutive terms in the Missouri Division of Corrections.
8. April 29, 1976. Notice of Appeal to the Missouri Court of Appeals, Kansas City District filed.
9. December 8, 1976. Cause transferred to Missouri Supreme Court prior to opinion by Court of Appeals.
10. September 27, 1977. Judgment and opinion of Missouri Supreme Court, affirming Petitioner's conviction, filed.
11. September 27, 1977. Dissenting opinion of Seiler, J. filed.
12. September 29, 1977. Motion for Rehearing filed.
13. October 11, 1977. Motion for Rehearing denied.
14. January 19, 1978. Petition for Writ of Certiorari filed.
15. May 1, 1978. Certiorari granted.

IN THE CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT

DIVISION No. 7

Case No. C-48011

STATE OF MISSOURI,

Plaintiff,

vs

BILLY DUREN,

Defendant.

INDICTMENT—FILED OCTOBER 3, 1975

Count I

MURDER FIRST DEGREE

Count II

ASSAULT WITH INTENT TO KILL
WITH PISTOL WITH MALICE

The Grand Jurors for the State of Missouri, duly summoned from the body of said County of Jackson, being duly impaneled, sworn and charged to inquire within and for said County, upon their oaths present and charge that at the County of Jackson and State of Missouri, on the 26th day of September, 1975, one BILLY DUREN, whose more full and true name is unknown to the members of the Grand Jury did then and there unlawfully, wilfully, feloniously, premeditatedly and deliberately and of his malice aforethought, either alone or knowingly acting in concert with another, make an assault in and upon one Carrol M. Riley, with a dangerous and deadly weapon, to-wit: .38 caliber revolver loaded with gunpowder and leaden balls, then and there inflicting upon the said Carrol M. Riley a mortal wound, and that from said mortal wound, the said Carrol M. Riley, within one year thereafter, to-wit: on the 26th day of September, 1975, at the County of Jackson and State of Missouri, died; against the peace and dignity of the State.

COUNT II

The Grand Jurors for the State of Missouri, duly summoned from the body of said County of Jackson, being duly impaneled, sworn and charged to inquire within and for said County, upon their oaths present and charge that at the County of Jackson and State of Missouri, on the 26th day of September, 1975, one BILLY DUREN, whose more full and true name is unknown to the members of the Grand Jury, did then and there unlawfully, wilfully, feloniously, either alone or knowingly acting in concert with another, and of his malice aforethought, make an assault and the said BILLY DUREN with a certain deadly weapon, to-wit: a pistol loaded with gunpowder and leaden balls, then and there feloniously, willfully, on purpose and of his malice aforethought, did shoot off at, against and upon said Lee Kinnison, then and there giving to the said Lee Kinnison in and upon the head and body of him, the said Lee Kinnison, with the pistol aforesaid did wound, with the felonious intent then and there him, the said Lee Kinnison, feloniously, wilfully, on purpose and of his malice aforethought, to kill and slay; against the peace and dignity of the State.

**IN THE CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT**

(Title Omitted in Printing)

AMENDED MOTION TO QUASH JURY PANEL—
filed February 4, 1976

Comes now the defendant, BILLY DUREN, by counsel, and moves the Court to quash any jury panel that may be produced as prospective jurors in this cause.

As grounds for this motion, the defendant alleges as follows:

1. Section 494.031, V.A.M.S., provides:

The following persons shall upon their timely application to the court be excused from service as a juror either grand or petit. . .

2. Any woman who requests exemption before being sworn as a juror;. . .

Article I, Section 22(b) of the Constitution of Missouri (1945) provides:

No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror.

The "Official Notice and Questionnaire" prescribed by Section 497.130, V.A.M.S., for distribution to prospective jurors, contains the following paragraph:

TO WOMEN:

The constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service.

(Signature)

These provisions, which result in a disproportionately small number of women being available for jury service, deny the defendant his right to have a jury panel selected from a fair cross-section of the community as guaranteed by the Sixth and Four-

teenth Amendments to the United States Constitution. *Taylor vs Louisiana*, U.S., 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

2. Section 497.130, V.A.M.S., also provides as follows:

1. The board of jury supervisors shall at least biannually compile a list of as many names as the board of jury supervisors designates in a written order made for the purpose of consulting any public records. . .

The list in no case shall contain less than twenty-five thousand names to be selected as nearly as may be equally from the several voting precincts in the county. . .

Defendant alleges that the lists of prospective jurors in Jackson County are not made up of names selected by "consulting any public records." Rather, prospective jurors are selected only from lists of registered voters, thereby drastically limiting the number of citizens that are potentially available for jury service. Therefore, jurypanels are not selected in accordance with the state law.

WHEREFORE, the defendant prays the Court to quash any jury panel produced and to declare Section 494.031, V.A.M.S., and Article I, Section 22(b) of the Constitution of Missouri in violation of the rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

**HEARING ON DEFENDANT'S AMENDED MOTION
TO QUASH JURY PANEL, HELD MARCH 29, 1976
BEFORE THE HONORABLE DONALD B CLARK,
JUDGE OF THE CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT, DIVISION NO. 7**

(DEFENDANT'S EXHIBITS NOS. 1, 2, & 3, LIST OF
STATISTICS OF JURORS, WERE MARKED FOR
IDENTIFICATION)

MR. HANDLEY: Your Honor, at this time—

THE COURT: Off the record.

(Off the record discussion)

(DEFENDANT'S EXHIBIT NO. 4, PARTIAL TRAN-
SCRIPT OF PROCEEDINGS, WAS MARKED FOR
IDENTIFICATION)

THE COURT: Let's go on the record then and get these
exhibits in.

MR. HANDLEY: At this time, we would offer Defend-
ant's Exhibit No. 1, which is a table of jurors summoned in
Jackson County for service for the month of January,
1976.

Defendant's Exhibit No. 2, a table of jurors summoned
in Jackson County for service in Kansas City for the
month of February 1976.

And Defendant's Exhibit No. 3, which is a summary of
Defendant's Exhibit No. 1 and No. 2.

And Defendant's Exhibit No. 4, which is a Partial Tran-
script of the Proceedings of *State of Missouri vs Vincent
X. Lee*, which, if my memory serves me, took place on the
14th day of November, 1975, before Judge Meyers of Divi-
sion 14 of this Jackson County Circuit Court, wherein Mr.
John Fitzgerald, Mr. Charley Rogers and Mr. Robert J.
Kramer were called as witnesses for the movant. And all
of whom testified as to work they had done and procedures
used in Jackson County to select jurors for service. So I
would offer those 1, 2, 3, and 4 at this time.

MR. BELLEMERE: State has no objection, Your
Honor, to their being admitted into evidence.

THE COURT: All right, we'll show Defendant's
Exhibits 1, 2, 3 and 4 received in support of the defend-
ant's Amended Motion to Quash the Jury Panel.

(DEFENDANT'S EXHIBITS NOS. 1, 2, 3, LIST OF
STATISTICS OF JURORS, WERE RECEIVED IN
EVIDENCE)

(DEFENDANT'S EXHIBIT NO. 4, PARTIAL TRAN-
SCRIPT OF PROCEEDINGS, WAS RECEIVED IN
EVIDENCE)

THE COURT: Is there anything further on that motion?

MR. HANDLEY: No, Your Honor, not at this time.

THE COURT: All right. At this time, the record will
reflect that the Court has considered the Amended Motion
to Quash the Jury Panel and overrules the same.

MR. HANDLEY: Judge, I would request permission of
the Court to withdraw the Exhibits, 1 through 4, at this
time.

THE COURT: All right. We'll show the exhibits re-
turned to the defendant's counsel for safekeeping.

DEFENSE EXHIBIT NO. 1, ADMITTED INTO
EVIDENCE AT HEARING ON AMENDED MOTION
TO QUASH JURY PANEL, MARCH 29, 1976.

TABLE OF JURORS SUMMONED IN JACKSON COUNTY FOR
SERVICE IN KANSAS CITY—JANUARY, 1976

WEEK	JURORS SUMMONED		EXCUSED OR DECEASED	DEFERRED	ABSENT	APPEARED FOR SERVICE
1/5/76	Male	247	70	19	6	152
	Female	80	49	2	17	12
	Total	327	119	21	23	164
1/12/76	Male	260	64	25	24	147
	Female	80	48	1	12	19
	Total	340	112	26	36	166
1/19/76	Male	245	71	18	14	142
	Female	76	45	0	10	21
	Total	321	116	18	24	163
1/26/76	Male	234	85	12	15	122
	Female	91	44	2	18	27
	Total	325	129	14	33	149
TOTALS FOR JANUARY 1976	Male	986	290	74	59	563
	Female	327	186 ^e	5	57	79
	Total	1,313	476	79	116	642

DEFENSE EXHIBIT NO. 2, INTRODUCED INTO
EVIDENCE AT HEARING ON AMENDED MOTION
TO QUASH JURY PANEL, MARCH 29, 1976

TABLE OF JURORS SUMMONED IN JACKSON COUNTY FOR
SERVICE IN KANSAS CITY—FEBRUARY, 1976

WEEK OF	JURORS SUMMONED		EXCUSED DECEASED	DEFERRED	ABSENT	APPEARED FOR SERVICE
2/2/76	Male	224	64	26	16	118
	Female	92	46	4	12	30
	Total	316	110	30	28	148
2/9/76	Male	243	66	18	23	136
	Female	87	48	1	10	28
	Total	330	114	19	33	164
2/17/76	Male	120	35	13	4	68
	Female	59	37	1	5	16
	Total	179	72	14	9	84
2/23/76	Male	235	59	19	7	150
	Female	101	53	2	19	27
	Total	336	112	21	26	177
TOTALS FOR FEBRUARY 1976	Male	822	224	76	50	472
	Female	339	184	8	46	101
	Total	1,161	408	84	96	573

DEFENSE EXHIBIT NO. 4, ADMITTED
INTO EVIDENCE AT HEARING
ON AMENDED MOTION TO QUASH,
MARCH 29, 1976.

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 14

STATE OF MISSOURI,
Plaintiff,

-vs-

VINCENT X. LEE,
Defendant.

C-47609

PARTIAL TRANSCRIPT OF PROCEEDINGS

On Friday, the 14th day of November, 1975, the above-entitled cause came on regularly for hearing before the Honorable Robert A. Meyers, Judge of Division 14 of the 16th Judicial Circuit at Kansas City.

HEARING

The State was represented by Mr. Gary Haggerty. The Defendant was represented by his attorney, Mr. Thomas Larson, and present in person.

The following proceedings were had:

THE COURT: Are you ready to proceed?

MR. LARSON: Yes, Your Honor. This morning we'd like to take up Defendant's motion to Quash the Jury Panel. We have two basic allegations in this motion. First of all, that the Missouri Statutes and Constitutional provisions that allow women to excuse themselves from jury service combined with the method of selecting potential jurors in Jackson County results in the disproportionately small number of women being available for jury service; and therefore, denies this defendant or any other the right to have a panel selected from a cross-section of the community. We have some testimony and exhibits connected with that allegation. Also, a second allegation is that the method of selecting potential jurors in Jackson County does not comply with the Section 497.130 of the revised statutes for the reason that the names of jurors that go

into the jury wheel are not selected approximately equally among the voting precincts of the County and in connection with these I'd like to call Mr. John Fitzgerald to the stand, please.

THE COURT: All right.

JOHN R. FITZGERALD,

being sworn by the Clerk, testified as follows:

DIRECT EXAMINATION BY MR. LARSON:

Q State your name, please.

A John R. Fitzgerald.

Q And you are a Jury Commissioner for the Circuit Court of Jackson County, Missouri; is that correct?

A That's right.

Q How long have you held that position?

A Since about February of this year.

Q Mr. Fitzgerald, would you describe for us, briefly, the method by which names are selected in order to send out the official notice and questionnaire for jury service?

A Well, that's done through the computer section and gets taken from the Voter Registration List. The percentage of the total number of voters registered in Jackson County is taken from across the board and the percentage of that total number are sent questionnaires.

Q Now, for the year 1975, do you have an estimate of about how many questionnaires were sent out in Jackson County?

A I do not have the exact number, Mr. Kramer in computer section does. I would say approximately 70,000 as far as I know at the present time.

Q Now, from that list, how many jurors or how many names are selected in order to produce names to go into the jury wheel?

A 25,000 is required by statute, if I'm not mistaken. I think it's the required number.

Q I want to direct your attention to what's marked as Defendant's Exhibit No. 1. Would you tell us what that is?

A That's the computer print-out of the jury wheel for 1975.

Q So, these are names of people who are potentially—can be put into the jury wheel; is that right?

A Well, this is the jury wheel.

Q Yes.

A Okay, thank you. Now, on this list—first of all, does it show the name of the person?

A Yes. They are in alphabetical order.

Q Is there a case that shows the sex?

A Yes, "M" for male and "F" for female.

Q And would you tell us briefly what other information is shown in these records?

A Of course, their middle initial, their birth date, a house number, their address, the city, which we have as a code, to determine where they live and then the Zip Code and then this space here shows the date of last service.

Q Now, this record is made on or about the time the names are actually selected; is that correct?

A Made after October of the preceding year of the year before they are to serve.

Q That is when you do select the names for the jury wheel?

A That's correct.

Q Is this record kept under your custody and control as Jury Commissioner?

A Yes, that's the print-out given to me from the computer section kept under my. . .

MR. LARSON: We would offer Exhibit 1 at this time, Your Honor.

MR. HAGGERTY: State has no objections.

THE COURT: All right. It will be received.

Q (By Mr. Larson) In order to get a list of potential jurors for a given week, how do you use the list contained in Exhibit 1?

A The presiding Judge designates how many jurors we are going to need for a given week. Then the computer room is given that number and then at random selection, why, the names are selected and a print-out list is made and sent to myself here in Jackson County, and then to the Deputy Jury Commissioner in Independence for the number he needs out there.

Q Let me direct your attention to what's been marked as Defendant's Exhibit No. 2, and would you describe for us what that is?

A This is the jacket. Inside it contains all the—contains the names of the people that actually served, the ones that were summoned. In other words, it's a complete jacket or juries for the week of January 2nd, 19 and 75, of

the people that actually showed, appeared, were paid, and in other words, a complete report of juries for that week.

Q You said January. I believe that says June.

A June, I'm sorry. June of '75.

Q Now, out of this pack marked Exhibit 2 let me show you a computer print-out sheet, that's titled Jurors Summoned for the week of 6/2/75; is that correct?

A That's correct.

Q I notice there are various marks on that sheet. Would you describe for us, first of all—first of all, besides the marks, does that show the name and the sex of the people that were summoned?

A That's correct.

Q And it's again, "M" for male and "F" for female?

A That's correct.

Q You have red lines drawn through some of the names. What do the lines indicate?

A Each red line means that juror has not been available for service that week. Either he's been excused, deferred, and did not or—well, did not appear. The check outside here—pencil check actually means he checked in with us on the Monday morning of this and was available to serve.

Q What if there is no mark at all?

A If there is no mark, then the person opposite that, and there is no red line, he didn't show. That's what we more or less classify as a "No show."

Q Now, what is the difference between being deferred and excused?

A Well, if you are being deferred, you are deferred to a later date, for service at a later date.

Q Is that difference noted on your record there?

A Yes, it is.

Q How?

A If there is a red line drawn through it and the date that the person is deferred to is different there—for instance on this one, on number 18 a Mr. William Bard was deferred to 9-2. In other words, he would be reporting in for jury service on the 2nd day of September.

Q Now—

A And goes on through several others.

Q I notice that on the right-hand column of this there are some red letters. What does the "E" mean?

A "E" means he's excused.

Q Okay. What does the "S" mean?

A Well, an "S"—if there is an "S" in there, there ordinarily it's served. But Independence shows a "S" and doesn't give the days. Here in Kansas City we give the number of days. In other words, if there is a number in there, he has served four days.

Q If there is an "S" that means he served, but you don't know how many days?

A Yes. On Independence, on their group they will come in, they will put an "S" and then opposite the "S" they put the number of days he served, but here in Kansas City we just put the number of days he served, but that's superfluous, he served four days or one day.

Q Now also, on the packet marked Exhibit No. 2, do you have a list there of the jurors who actually did report for service on the week of June 2nd, 1975?

A This is the one from Kansas City. We do not have one from Independence. They keep their records out there. This is a list of the actual names, the number of days they served, the mileage that they received, the check number that was issued to them and the total amount of money that was paid to them.

Q Does that show the full name of the jurors?

A Yes.

Q Does it show their sex on that?

A No, it does not.

Q Is it possible to determine their sex by checking their name back against the computer print-out sheet?

A Yes, it would be very easy. All you had to do is check the name back on the computer and then determine whether it's male or female. I mean, the name Eugene or Gene or something like that could be both, you'd have to do it that way, because there is no way on this to determine sex from this list.

Q Is there also a report in this packet that would show the number of "No-shows" by sex?

A Yes, from the Kansas City office we do. Well, it shows the number of—yeah, that failed to report, yes. Both men and women.

Q Okay. Now, again, is this a record that is made at or about the time—that was made on or about June 2nd?

A During the week of June 2nd. It would be the latter part of the week when we have the full statistics for the week as to. . .

Q And the records are produced and maintained during the course of your business as Jury Commissioner?

A That's right.

Q Kept under your custody and control, is that correct?

A They are.

MR. LARSON: We would move for admission of Defendant's No. 2, Your Honor.

MR. HAGGERTY: No objection.

THE COURT: All right. It will be received.

MR. LARSON: Now, Mr. Haggerty, Defendant's Exhibit 3 through 24 are similar records for the weeks of June 9th through the week of November 3rd, 1975, inclusive. Would you be willing to stipulate that these are also business records of the Jury Commissioner?

MR. HAGGERTY: They contain the same information except for different weeks?

THE WITNESS: That's correct.

MR. LARSON: We would offer Defendant's Exhibits No. 3 through 24, Your Honor.

THE COURT: All right. They will be received.

Q (By Mr. Larson) Mr. Fitzgerald, directing your attention to what's been marked as Defendant's Exhibit No. 25, will you tell us what that is, please?

A Yes, this is the computer print-out of the names of the people that have been summoned for jury duty for the week of the 17th of this month. That would be the coming Monday.

Q Does that show the names and the sex of those people?

A It does.

Q Have you, sir, had an opportunity to count the number of females on there as compared to the number of males?

A I have.

Q Would you give us those figures?

A Eighty-eight women out of the total number of 300. Of that 300, eighty-eight are women.

Q Okay. And this is an official record also, as the others you've testified about?

A Yes. It will be used Monday morning.

Q This one does not yet contain the notation of people excused and things of that nature?

A No, we are in the process of now doing that and by

Monday it will—we'll have more information on it by Monday after the jurors have checked in and we have determined who is available.

MR. LARSON: We would offer Defendant's Exhibit No. 25.

MR. HAGGERTY: No objection.

MR. LARSON: Mr. Haggerty, what's been marked as Defendant's Exhibit 26 is a census data compiled by the United States Department of Commerce. Would you be willing to stipulate to that exhibit?

MR. HAGGERTY: Yes.

MR. LARSON: On the State stipulation, Your Honor, we would offer Defendant's Exhibit No. 26, and apologize for the marked up condition of that one.

THE COURT: All right. It will be received.

Q (By Mr. Larson) Let me show you what's been marked as Defendant's Exhibit No. 27. Would you tell us what that is, please?

A This is the official questionnaire notice that's mailed to prospective jurors under the statutes.

Q Is that form prescribed by statute?

A Word to word.

Q At the bottom of the very bottom of that form, is there a place for women to indicate whether or not they wish to serve?

A Yes, this one section here, the Constitution permits women to elect to serve or not to serve as jury women and any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the Jury Commissioner at once. It will not be necessary to answer the other questions. It states, "I elect not to perform jury service," under the signature of the person it's sent to.

Q I'll show you what's been marked Defendant's Exhibit No. 28. Could you tell us what that is?

A This is one of the printed summons sent to all our jurors by mail.

Q On the back of that, is there a similar notation concerning women?

A In a paragraph—let's see, 1, 2, 3, fourth paragraph down, it's printed in red "Women." And the statement "If you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible."

Q And both Exhibits 27 and 28 are forms that you furnished to me yesterday; is that correct?

A That's correct.

(The exhibits were handed to Mr. Haggerty.)

MR. HAGGERTY: No objection.

MR. LARSON: We would offer Defendant's Exhibits 27 and 28, Your Honor.

THE COURT: They will be received.

Q (By Mr. Larson) Mr. Fitzgerald, if a juror is sent a questionnaire and fails to return it, what steps if any are taken to either contact your juror or—what is done about that juror?

A Well, in the questionnaire, if the questionnaire is not returned, then his name is automatically as it is stated will automatically be subject to be placed in the wheel. In other words, it's not definite that his name will be in the wheel, but if the questionnaire is not returned to us, then his name is subject to be placed in the possibility of being drawn for a jury wheel.

Q And would men and women who receive such a questionnaire be treated the same way as in such a situation?

A Yes, sir.

Q All right. Now, if the name eventually ends up in the jury wheel and a particular person is sent a summons, what steps, if any, are taken if the person fails to respond to the summons?

A Well, the names of the men are compiled and we send them to Judge Vardeman, his bailiff then tries to check out to determine what was the reason why they did not appear and serve.

Q You said that was the men. What about the women who fail to respond to summonses?

A Due to the fact that, by statute, women are not required, if they don't want to serve, then nothing is done on the women because all they would have to do is express their feeling that they didn't want to serve, so nothing is done.

Q Effectively, if a woman does not want to respond to a summons, her name is taken out of the jury wheel?

A Not taken out of the jury wheel, it's deleted from that week's service.

Q Would she be summoned again?

A No, no juror is summoned twice within one jury wheel.

Q Okay. And any juror that's excused during a particular week whether male or female, does his name go back in the jury wheel or stay out?

A No, it does not.

Q Stays out?

A Uh-huh.

Q All right. Directing your attention back to Exhibit No. 1, which you have described some of the portion of that already, is there any way to tell by looking at that record which voting precinct within Jackson County that the particular person lives in?

A Not to my knowledge.

Q Okay. Mr. Fitzgerald, each week do you personally observe the jurors who report for jury duty?

A Yes, I do. They check in with me every Monday morning personally. They check in with me first of all. I ask their name and address and if there is any change in their name and address, it's noted, then mailed and we place it then in—

Q Over the week do you have opportunity to notice how many men and how many women appear each week?

A Oh yes, yes.

Q Could you give us an approximation based on your experience of how many jurors appear each week on the average?

A How many actual jurors appear?

Q Right.

A Well, actually, I can tell you from each one of our records at the top here. There is a figure there that will tell you the total number that appeared for that week. A hundred sixty-nine appeared that week, actually, to serve. I can't give you a definite figure. Some weeks we call 350 and at the present time we are calling approximately 300. And it varies between the two, but I don't know the percentage. I have never figured the percentage.

Q Mr. Fitzgerald, that's all the questions I have. Thank you, sir.

CROSS-EXAMINATION BY MR. HAGERTY:

Q Mr. Fitzgerald, you indicated, did you not, that the jury wheel as indicated by Defendant's Exhibit No. 1 is compiled in October?

A Yes, that's right, of the year before.

Q All right. And that wheel is comprised of the registered voters in Jackson County; is that right?

A A percentage of them, yes.

Q A percentage of them. And how do you determine that percentage?

A Well, the actual start of it has to go from the computer room. They are the ones that start out with it.

Q All right. And then that list is made up. The jury wheel is made up without regard to whether or not you need a certain percentage of men or women on it; is that right?

A That's right.

Q Randomly selected?

A That's right.

Q So you have no control over the number of men or women?

A No, no.

Q And you have no way of telling from the jury wheel how many— what percentage of women are registered versus what percentage of men are registered; is that right?

A No, no.

Q The questionnaire that you send out and the summons are as the statute requires; is that right?

A That's right.

Q Containing the warning or notice to the women regarding their—that they do have an exemption if they desire to take advantage of it; is that correct?

A That's correct, yes.

Q And if a woman fails to appear for jury service in one particular term she's then put back in. She's subject to be put back in for the next wheel as any other registered voter would be?

A Yes. Of course, the fact is, if she's a registered voter in the following year, why, anybody that's a registered voter, his name is there, and can be chosen at random when we select the questionnaires to be sent out.

Q Requires a selection on her part each time she may be selected in the jury wheel to abstain from jury service?

A That's correct. If she gets a questionnaire, if she doesn't want her name even to be there, all she has to do is send that questionnaire back in and her name would not even be in the prospective—

Q That's only for this particular jury wheel, is that right?

A Yes, for that year. It's done every year.

Q It's very possible that she could have to exercise that same option the next time she's called for jury service?

A That's right. I mean, if she sends it in and says she doesn't—wants to serve, when she gets the summons she still has the right to decline it, because she still has that Constitutional right as far as we're concerned.

MR. HAGGERTY: No further questions.

REDIRECT EXAMINATION BY MR. LARSON:

Q Just one more question. It's still possible, even if the woman answered the summons, if she would report to either you or the court on Monday morning, she could still excuse herself then, couldn't she?

A They do. A lot of them come in and say, "Here's my summons. I don't care to serve." There is no way for us to tell her that she has to. We just accept her summons and note it that she's under the Constitution doesn't require to serve, and we then put it as such.

Q So, if she takes affirmative action by telling you that she doesn't want to serve, then she's off, right?

A Yes, that's right.

Q If she takes no action by simply not showing up, she's also off; is that right?

A Uh-huh, because as the Constitution states—if we called her and said, "Hey, why don't you"—she doesn't want to serve. There would be no other purpose of calling her.

MR. LARSON: I believe that's all the questions I have. Your Honor, all these things marked as exhibits need to be returned to Mr. Fitzgerald. He's agreed that they would be kept intact and we thought we'd take them back there after this hearing, but they'd be available at any time the Court or prosecutor would want to look at them, I'm sure.

THE COURT: All right.

Q (By Mr. Haggerty) I have one question. She's not automatically, because of the fact she's a woman, not automatically kept off the jury wheel unless she asked to be put on? She's kept on the jury wheel as a registered voter regardless of whether she's a female or male; is that right?

A In other words, if her name is selected out of the voter registration to be sent a questionnaire, she then has the right at that time to elect to have her name placed there. It's not necessary that she will actually be on the jury, just that she will be—then also has the right again, if she is placed in the wheel and given a summons, the right to decline. She has two chances to decline, when the ques-

tionnaire is sent to her and when the summons is sent to her.

MR. HAGGERTY: I have no further questions.

MR. LARSON: That's all I have.

(The witness was excused.)

CHARLES M. ROGERS,

being duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION BY MR. LARSON:

Q Would you state your name, please?

A Charles M. Rogers.

Q And are you employed by the Office of Public Defenders?

A Yes, I am.

Q And are you employed there as a law intern?

A Yes, I am.

Q At my direction, Mr. Rogers, have you had an opportunity to examine what has been marked as Defendant's Exhibit 11 on through 23?

A Yes, I have.

MR. LARSON: Your Honor, I'll give you copies of these that are not actually marked as exhibits for your information.

Q Now, let me direct your attention to what's marked here as Defendant's Exhibit No. 29, and what is that titled?

A It's titled Tabulation of Data Obtained from Lists of Jurors Summoned for August of 1975.

Q Is this a document that was prepared by you?

A Yes, it was. It was typed from a handwritten original prepared by me.

Q In order to get these figures that are shown for the week of August 4, 1975, which of these exhibits did you examine?

A I examined Defendant's Exhibit No. 11.

Q Did you count the number of males and females contained in the computer print-out that says Jurors Summoned for the Week of August 4th?

A I counted the number of females and—counted them twice, as a matter of fact, to check myself, and then I obtained the number of males by subtraction.

Q And what other—what's contained in the information columns in this exhibit? Would you describe how you got those numbers? Where it says "Excused," how did you count those?

A "Excused" I went through and those who had been marked with a red line and checked to see if there was a date by the red line which would indicate that they were deferred. If they were, I put them in the deferred column, if there was no date there, I put them in the Excused column.

Q What about the ones not appearing, where did that figure come from?

A Comes from two places. First of all, there is no red line through the name and there is no check mark over at the extreme left-hand side of the print-out next to the name, then they did not appear, and also, you'll see that where that's the situation, there will be over in the column entitled "Sex" there will be an "X" through the letter there, if it's a male or a circle around the letter, if it's a female and those are those who did not appear.

Q On the final column where it says "Appeared for service," where did you arrive at those figures?

A I went through and counted all the females through the sex column which were neither circled as not appearing and where not red lined as deferred or excused. And then, I got the number of males, once again, through subtraction.

Q And the percentages that appear, is that a figure that you computed yourself?

A Yes. I have computed it arithmetically.

Q Now, on the week of August 4th we show on the far right-hand column, 83 people appeared for service and will you tell us the percentages of male and female?

A Twelve percent were female and eighty-eight percent were male.

Q Now, on August 11th the figures that are shown in Exhibit 29, did you arrive at those by doing a similar process with the information contained in Defendant's Exhibit 12?

A Yes, I did. I did that for each week in Exhibits 11 through 23.

Q And so Defendant's Exhibit—taking them in order, Defendant's exhibit 29 starts with which week?

A Starts with the week of August 4th.

Q And that goes through which week?

A Goes through the week of August 25th.

Q The exhibit marked No. 30 starts with which week?

A The week of September 1st.

Q And goes through which week?

A The week of September 29th.

Q And Defendant's Exhibit 31 starts with which week?

A The week of October 6th and goes through the week of October 27th.

Q And for each of these weeks that you have made calculations, those calculations are made from these previously marked exhibits that would bear the same weekly data; is that correct?

A That's correct.

MR. LARSON: We'd offer Defendant's Exhibit 29, 30, and 31 at this time, Your Honor, as—primarily as an assistance to the Court and as a compilation of the data contained in the exhibits. We have not made the compilations for the month of June and July, simply because we haven't had time to do so yet.

I have no further questions.

MR. HAGGERTY: No questions.

MR. LARSON: Thank you.

(The witness was excused.)

ROBERT J. KRAMER,

being first duly sworn by the Judge, testified as follows:

MR. LARSON: Your Honor, were Exhibits 29, 30, and 31 received?

THE COURT: Was there any objection to these exhibits?

MR. HAGGERTY: I had no objections.

THE COURT: All right. They will be received.

DIRECT EXAMINATION BY MR. LARSON:

Q State your name.

A Robert J. Kramer.

Q Mr. Kramer, my name is Tom Larson. I represent the defendant. I spoke with you by phone previously. Would you state what your occupation is, please?

A Director of Data Processing for the 16th Judicial Circuit.

Q In that capacity are you responsible for selecting the names of people to whom official notice and questionnaires for jury service are sent?

A Responsible for the actual procedure. The actual responsibility lies with the Jury Commissioner.

Q And you say you are responsible for the procedure?

A Carrying out the procedures.

Q Okay. Would you describe for us the procedure that you use in order to ascertain the names of people to whom questionnaires are sent?

A Okay. We select approximately one-fourth of the registered voters in Jackson County. There is actually two different procedures that are used. The Kansas City Voter Registration Roles is an automated system and we acquire a magnetic tape of the registered voters from Kansas City, which is in a ward and precent sequence. From that we select every fourth individual.

The Independence procedure: The information is captured directly from the manual records that are kept at that location and the same procedure, only a manual capture of the data from the original books.

Q Okay. You said this is done—these lists are kept by ward and precinct. What steps, if any, are taken to determine that the names selected are selected approximately equally from the various voting precincts?

A Well, the procedure—both files that we select from are in ward and precinct sequence, and the first year we used this procedure we started with the first name and each fourth name thereafter. And then each following year we would—the following year we would start with the second name and each fourth name thereafter, and consequently getting a proportionate number of individuals by ward and precinct.

Q Now, approximately how many names were selected for the receipt of questionnaires for this year, for 1975?

A Approximately 70,000.

Q The next step, I take it, was the questionnaire mailed out to 70,000 people; is that correct?

A Yes, sir.

Q When was that done?

A I don't recall the exact date.

Q Approximately.

A The latter part of September.

Q Of what year?

A Seventy-four.

Q And these questionnaires are to be mailed back in, is that right?

A Yes, sir.

Q What is done with the questionnaires in terms of sorting them after they are mailed in?

A They are sorted by—depending on the individual's

response to the questionnaire itself. Certain individuals may elect serve, others are exempt, some because of age, sex, professional status, and so forth. These are separated.

Q The ones that are separated because of these exemptions, are they what you classify as "Bad questionnaires"?

A Only for simplification purposes, yes.

Q Do you have any estimate of how many "Bad questionnaires" were received from the batch that you sent out in September of '74.

A The actual wheel that is in current use is approximately 30,000 (sic) and consequently, there were roughly 40,000 in this category.

Q Now, the "Bad questionnaire" category does include those people that exempted themselves because of sex; is that correct?

A Yes, sir.

Q Do you have any records that would show how many exemptions for sex were taken on the questionnaires?

A No, sir.

Q Were those questionnaires saved from last year?

A No.

Q Now, you have in front of you a document marked Defendant's Exhibit No. 1, and that's been identified by Mr. Fitzgerald as the jury wheel for 1975; is that correct?

A It is a printed listing of the jury wheel, yes, sir.

Q All right. Now, would you examine that list and tell us if there is any way to determine what voting precinct these people live in, just by looking at that record?

A No, sir.

Q Would you describe for us what steps, if any, are taken to determine that that list is made up of people selected approximately equally from the various voting precincts in Jackson County?

A Okay. To the best of my ability, the portions of the statute that refers to wards and precincts refers to the actual questionnaires that are to be sent and not necessarily that the wheel has to be—the wheel has to contain a percentage of people by ward and precinct.

Q Do I understand your testimony to be then, that after you have sent out the questionnaires in accordance with the procedure you described, you do not take any further affirmative steps to see that the jurors are divided equally among precincts?

A That's correct.

Q All right. Are you in the process now of receiving back questionnaires to make up a jury wheel for 1976?

A Yes, sir.

Q And are you also in the process of sorting out the bad questionnaires?

A Yes, sir.

Q Do you have any approximation of how many questionnaires you have received back?

A Not at this point, no.

Q Would it number in the thousands?

A Yes, sir.

Q Would it also be a fair statement to say there are thousands of bad questionnaires?

A Yes, sir.

Q And the only way to sort those out is to go through each one and decide whether persons exempted themselves for sex or some other reason?

A Yes, sir. It's a manual, individual basis.

MR. LARSON: I have no further questions, sir.

CROSS-EXAMINATION BY MR. HAGGERTY:

Q Mr. Kramer, you said if I understand, that the initial 70,000 questionnaires that were sent out, the names are selected from the Voter Registration Roles, either here in Kansas City or out in the Independence area, and they are made out—

A Both.

Q Pardon?

A Both.

Q All right. And you use a random process of one of every fourth name to select those questionnaires; is that right?

A Yes, sir.

Q The idea being that eventually, four wheels, you will then have had every name who is on the—

A Theoretically, yes.

Q Theoretically, every man who is on the list of registered voters has been sent a questionnaire regarding jury service; is that right?

A Theoretically, but in practice it's not true, because there are people continually adding to the list, people continually being deleted from the Voter Registration List, which puts everybody in a new—

Q But, in your opinion as being in charge of programming for the County, in this regard, is that the best way

possible to insure that you do get the questionnaires sent out in the equal proportion to the voting precincts as possible in this County?

A Yes.

MR. LARSON: I object to the question and response, Your Honor, as calling for a conclusion, now he's asking him if he's fulfilling the terms of the statute. I have no question Mr. Kramer is doing a good job, but I don't think he's qualified to say whether that meets the terms of the statute.

MR. HAGGERTY: Your Honor, he's in charge of setting the programs for selecting the—

THE COURT: Rephrase the question.

Q (By Mr. Haggerty) Is it your opinion, the methods that you are presently using, that is of selecting every fourth name from either the magnetic records that are kept in the Kansas City office of the Board of Election Commissioners or the actual physical records out in Independence office, that that method of selecting every fourth name is the best possible program that you could establish to insure that the questionnaires are sent out equally to members of each voting precinct?

MR. LARSON: Just a moment, Mr. Kramer. My objection, Your Honor, is not subject for opinion testimony by this witness.

THE COURT: I'll overrule the objection.

A The both lists are in order by ward and precinct, and consequently if you select each—every fourth individual, it will be proportionate by ward and precinct.

Q So your answer then, is, yes?

A Yes, sir.

MR. HAGGERTY: I have no further questions.

REDIRECT EXAMINATION BY MR. LARSON:

Q Mr. Kramer, after the bad questionnaires are sorted out, are any efforts made to determine where these people that are exempted live in terms of their ward or precinct?

A No, sir.

Q Are any efforts made to determine whether the people left over, the ones not exempted, where they live in terms of ward or precinct?

A No, sir.

Q When you sort out the bad questionnaires, is some step taken to delete that particular name from the computer?

A Yes, sir.

Q How is that done?

A Well, it is actually deleted from our automated wheel.

Q Now, does that process leave any record of why the deletion was made? In other words, does it show whether it was made because of sex or age or some other reason?

A No, sir.

Q So in other words, there is no way to retrieve from the computer the nature of the exemption that led to the name being deleted?

A No, only through manual process baking up to the exact questionnaire itself.

MR. LARSON: I have no further questions.

RECROSS-EXAMINATION BY MR. HAGGERTY:

Q It's possible, is it not, some of the bad—what you call bad questionnaires, that is questionnaires where people ask to be excused for one reason or another, would involve more than one reason as its basis for excuse; is that right? For instance, a person could be excused because they are a woman—female and over 65, or female and also are involved in professions that would be exempted; is that correct?

A Yes, sir.

Q It would be difficult for you to say exactly what was the reason for the excuse just from looking at the fact that if a person is a woman she's excused; is that right?

A Yes, sir.

Q May be more than one reason why a female is excused from jury service; is that right?

A Yes, sir.

MR. HAGGERTY: All right. No further questions.

MR. LARSON: Thank you, Mr. Kramer.

(The witness was excused.)

HEARING ON DEFENDANT'S MOTION FOR NEW TRIAL HELD APRIL 21, 1976

(DEFENDANT'S EXHIBIT NO. 1, GENERAL POPULATION CHARACTERISTICS OF MISSOURI, WAS MARKED FOR IDENTIFICATION)
(DEFENDANT'S EXHIBIT NO. 2, SUMMONS FOR JURY SERVICE, WAS MARKED FOR IDENTIFICATION)
(DEFENDANT'S EXHIBIT NO. 3, OFFICIAL NOTICE AND QUESTIONNAIRE FOR JURY SERVICE, WAS MARKED FOR IDENTIFICATION)
(DEFENDANT'S EXHIBIT NO. 4, TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR MARCH, 1976, WAS MARKED FOR IDENTIFICATION)
(DEFENDANT'S EXHIBIT NO. 5, MASTER PRINT-OUT OF 1976 JURY WHEEL, WAS MARKED FOR IDENTIFICATION)

THE COURT: All right. The record should reflect in Case Number C-48011, *State vs Billy Duren*, the cause was tried before a jury which, on March 31, 1976, returned verdicts of guilty as to Count I and Count II, and determined the sentence on each count to be life.

The defendant was granted 20 days in which to file a motion for new trial. That motion was filed on April the 14th, 1976, timely.

The Court has set a hearing this morning for consideration of the motion for new trial and such additional evidence as the defendant may wish to offer in support of that motion.

MR. LARSON: Your Honor, in support of the first allegation of the motion concerning the quashing the jury panel, we'd like to call Mr. John Fitzgerald to the stand, please.

JOHN FITZGERALD,

having been duly sworn by the deputy court administrator, testified as follows:

DIRECT EXAMINATION BY MR. LARSON:

Q State your name, please, sir.

A John R. Fitzgerald.

Q And what is your position?

A I am Jury Commissioner for the Jackson County Circuit Court, of the 16th Judicial Circuit, State of Missouri.

Q Mr. Fitzgerald, let me show you what's been marked Defendant's Exhibit 5, and would you tell us what that is?

A This is the Jury Wheel that we select jurors from for the year of 1976.

Q Looking at that record, can you determine by looking at this record whether the people listed here are male or female?

A You can determine it by the heading "Sex," and you go over and "F" is for female and "M" is for male.

Q And is this the list that is being used during this calendar year to select jurors for jury service?

A It is.

MR. LARSON: Mr. Bellemere, would you stipulate this is the official record of Jackson County Circuit Court?

MR. BELLEMERE: I will.

MR. LARSON: I would offer Defendant's 5, Your Honor.

THE COURT: It will be received.

(DEFENDANT'S EXHIBIT NO. 5, MASTER PRINT-OUT OF 1976 JURY WHEEL, WAS RECEIVED IN EVIDENCE)

DEFENDANT'S EXHIBIT NO. 6, JURY PACKET OF JURY INFORMATION FOR THE WEEK OF MARCH 29, 1976, WAS MARKED FOR IDENTIFICATION)

Q (By Mr. Larson) Mr. Fitzgerald, show you what's been marked Defendant's Exhibit 6, and would you identify that please.

A This is our folder of our records kept for the week of March the 29th, for jurors summoned for Kansas City and Independence and all the records of trial held pursuant to that week, the actual jurors that did appear, those that did not appear and those that served.

Q By examining the records in that packet, can you determine the sex of the names of the people that are listed there?

A Yes, same way as in the Jury Wheel. On the print-out on the top there, where it titled, "Last Name, First Name, Middle Initial, Sex," and determines "M" for male and "F" for female.

Q If a person is excused, what does that mean?

A Well, they are excused either for this selection of service for this week.

Q If a person is deferred, what does that mean?

A Means he's deferred to a later date which is—means that he cannot be—he's not serving that week, but he cannot

be deferred for longer than a 90-day period by statute. But it is determined, the exact date, it's written in what date he is deferred to.

Q By examining the document you now have in your hand, how do you determine which people actually appeared for service during the week of March 29th?

A On the last side column there is a handwritten "S.O." and a figure, which gives the number of days they served. "S" for "service" and the other two digits are for the number of days. Otherwise—like Anderson, Earl, here, S.O. 4, and the last column means that that man served for four days.

Q Mr. Fitzgerald, do you keep similar jackets of information for each jury week of the year?

A Yes, for every week that we have a jury this record is kept and compiled.

MR. LARSON: Your Honor, I believe prior to the trial of this case, we had entered some exhibits that showed tabulations of information from the week—jury jackets for each week in the month of January and each week in the month of February. And those were entered into evidence by stipulation as Defense Exhibits 1 and 2.

Now, Mr. Bellemere, Defense Exhibit 4, I would, if you would be willing to stipulate to that, that reflects similar tabulations for the weekly jury packets for the month of March.

MR. BELLEMERE: I'd like to ask, on Exhibit 4 there, is that a tabulation made by you or by Mr. Fitzgerald?

MR. LARSON: It's a tabulation made by a law intern in the Public Defender's Office; it was done in Mr. Fitzgerald's office.

MR. BELLEMERE: I'll stipulate that's a tabulation made by your law intern using the records of Jackson County.

MR. LARSON: And we would offer it on that basis, Your Honor.

THE COURT: It will be received.

(DEFENDANT'S EXHIBIT NO. 4, TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR MARCH, 1976, WAS RECEIVED IN EVIDENCE)

MR. LARSON: We would also offer defendant's 6.

MR. BELLEMERE: Prior to that going into evidence, I'd like to ask one question.

MR. LARSON: Certainly.

MR. BELLEMERE: Mr. Fitzgerald, in that packet that has heretofore been marked and identified by you as State's Exhibit—or Defendant's Exhibit 6, there are markings on the forms that you have that show people were either deferred or excused, is that right?

THE WITNESS: That's correct.

MR. BELLEMERE: And is there any indication of why those people were either deferred or excused on your records?

THE WITNESS: No.

MR. BELLEMERE: I have no objection to that exhibit being admitted into evidence.

THE COURT: The exhibit will be received.

(DEFENDANT'S EXHIBIT NO. 6, JURY PACKET OF JURY INFORMATION FOR THE WEEK OF MARCH 29, 1976, WAS RECEIVED IN EVIDENCE)

MR. LARSON: In connection with these two exhibits, that have been received, Number 5 and Number 6, on this motion, we would request that those be returned to Mr. Fitzgerald's custody, it's necessary for him to keep those.

THE COURT: We'll show the exhibits are returned to Mr. Fitzgerald.

Q (By Mr. Larson) Mr. Fitzgerald, let me show you what's marked as Defense Exhibit 2. Would you tell us what that is?

A This is the—a copy of a jury summons that is mailed out approximately 30 days prior to the time that they are required to report either to Kansas City or Independence for service.

Q Is that a standard form?

A It is a standard form.

Q And would every juror who receives a summons receive one that is like this one?

A Yes, sir.

Q Show you what's marked Defense Exhibit 3, and would you tell us what that is, please.

A This is the Official Notice of Questionnaire that is sent to prospective jurors in October of the year prior to the making of the Jury Wheel.

Q All right. Approximately how many of those are sent out in October?

A Oh, I would say approximately 25 per cent of the registered voters I think it numbers somewhere between 60 and 70 thousand.

Q Are those sorted after they are received in your office?

A They are sorted in the computer section by employees when they are received back, if they are received back. Some are not received back. But the notification is, it states here that if they are not received, they are subject to being called in the following year.

Q All right.

MR. BELLEMERE: Mr. Fitzgerald, as it relates to Defense Exhibit 3, are these exhibits, after they are prepared by prospective jurors and sent back to the Jackson County Jury Commissioner, are they kept; in other words, do you have, for the year 1976, all the exhibits that are similar to Defendant's Exhibit 3 in your custody showing what jurors said in relation to the specific questions that were asked on this form?

THE WITNESS: They are sent back and they are in the Court Administrator's Office. I do not have them personally under my control at the present time. But they are stored in the Court Administrator's Office, which—where I am part—

MR. LARSON: Excuse me, Mr. Fitzgerald. I think the record should show, Your Honor, that my office now has all of those questionnaires that were sent out in October and September of 1975 for the '76 Jury Wheel, pursuant to an order that we obtained from Judge Vardeman. They are in our custody now.

THE COURT: Well, it's my understanding, gentlemen, that the—that those are normally discarded.

THE WITNESS: After they have come back, they are ordinarily discarded, Judge. As Mr. Larson has stated, they came back into our office and they by order of the Presiding Judge, on a request from the Public Defender's Office to go through these, these were saved for that purpose, but beyond the year's purpose, I mean, they would be destroyed. We would not have any record beyond the year. I mean for '76, we had them and we were compiling the wheel and therefore, after they were used and the wheel was compiled, those records would be destroyed. We would have no record of them from then on.

Q (By Mr. Larson) Okay. And this Notice and Questionnaire Form is a form that's prescribed by statute, is that right?

A It is definitely, that and that only, that's the only questions that can be asked. And it's definitely stated in the statute.

MR. LARSON: Offer Defendant's 2 and 3, Your Honor.

MR. BELLEMERE: I have no objection.

THE COURT: They'll be received.

(DEFENDANT'S EXHIBIT NO. 2, SUMMONS FOR JURY SERVICE, WAS RECEIVED IN EVIDENCE)

(DEFENDANT'S EXHIBIT NO. 3, OFFICIAL NOTICE AND QUESTIONNAIRE FOR JURY SERVICE, WAS RECEIVED IN EVIDENCE)

Q (By Mr. Larson) Now, a couple of more questions, Mr. Fitzgerald. If a person receives a summons and fails to appear on the week that he was summoned for, what happens?

A Well, the name is taken down as a no-show, and through either my office or the Presiding Judge's Office, he is called and asked for what reason or to determine what reason he did not show for service and everything and the determination by the Presiding Judge as to what can be, should be done about his not showing for jury service.

Q Is the same procedure followed if a woman fails to answer a summons?

A Because of the statutes and everything, we are not—we do not compel women to appear.

Q If a woman fails to return a questionnaire, what happens?

A Her name goes in the wheel if she fails to actually return the questionnaire. Her name goes in the wheel.

Q But if she failed to appear at any later time, would anything be done?

A No.

Q All right.

MR. LARSON: I believe that's all the questions I have, thank you, sir.

CROSS-EXAMINATION BY MR. BELLEMERE:

Q Because a woman would fail to appear, you have no knowledge of what reason she would use, whether it was that she couldn't get there then or whether or not she desired not to serve?

A That's right. We have no knowledge whatsoever. If she—she could call in and say she didn't want to serve or

what, but we have no knowledge of that and we keep no records of it whatsoever.

Q And your file follows the law as its prescribed by statute.

A That's correct.

Q And that statutory law makes the allowance for women to do the things that you have testified to today to the Court.

A That's correct, yes.

MR. BELLEMERE: I have nothing further.

MR. LARSON: One more thing. If a woman appears on a Monday morning pursuant to a summons and tells you that she does not want to serve, do you ask her any other questions about why?

THE WITNESS: No, sir. All she states, she does not want to serve, we pick up her jury summons, mark her off the list as being excused and her summons then is—she's an excused woman, a female, and therefore nothing else—

MR. LARSON: All right. Thank you, sir.

THE COURT: One further question, Mr. Fitzgerald. I don't know whether this was covered or not, but to have the record complete, in making the selection of the list of names to be circularized in October with the questionnaire form which you have described, I understand that you use the list of registered voters, is that right?

THE WITNESS: That's correct.

THE COURT: Now, in selecting, you don't use the entire list.

THE WITNESS: We go through 25 per cent of the list on a computer basis.

THE COURT: Right.

THE WITNESS: Mr. Kramer, in the computer section.

THE COURT: You do that on a random selection.

THE WITNESS: Correct.

THE COURT: Now, in that process, is there any attempt made to select a greater or lesser number of males or females?

THE WITNESS: No determination whatsoever, as far as I know.

THE COURT: That's all.

MR. LARSON: I have Mr. Kramer here that can testify about that.

THE COURT: Thank you, Mr. Fitzgerald.

MR. LARSON: Thank you, Mr. Fitzgerald.
(Witness excused)

THE COURT: You want to come up, Mr. Kramer, you're going to have—

MR. LARSON: Could I have just a minute to step across the hall? I think I have got a problem with some arraignments over here. I don't know if we have got somebody to cover it or not. I just want to tell Judge Moore. I'll be right back.

THE COURT: You want to come forward, Mr. Kramer.

ROBERT KRAMER,

having been duly sworn by the deputy court administrator testified as follows:

DIRECT EXAMINATION BY MR. LARSON:

Q Would you state your name, please.

A Robert J. Kramer.

Q And what is your position?

A Director of Data Processing.

Q In that position, Mr. Kramer, are you responsible for selecting names of persons in Jackson County to whom Notice of Questionnaire Forms for Jury Service are sent?

A Yes, sir?

Q And how do you do that?

A It's done on an annual basis. We utilize the voter registration rolls for Kansas City and Jackson County. We select from those two lists one-fourth of the voter registration rolls, and I may correct one statement. The selection is not done on a random basis. The selection is done—the lists are in ward and precinct sequence and we select every fourth name starting at the beginning and going through the list. Each year we're—starting selection number varies. We start the first year that we did this particular process, started with the first record and every fourth record through the voter registration rolls, capturing one-fourth of the voter registration rolls from that. From that one-fourth, we send out approximately 60 to 70 thousand jury questionnaires. The responses from those questionnaires is used in building a jury wheel that we use for a period of approximately one year.

Q Now, when those questionnaires are mailed back to the Jury Commissioner's Office, are they sorted under your direction?

A Yes, sir.

Q And is it, at that time, that you determine which of those are what you call bad questionnaires?

A Yes, sir.

Q Would you tell us what a bad questionnaire is?

A Well, there's several categories. Individuals over 65 years of age can elect not to serve. Women can elect not to serve. There is several categories on the questionnaire itself that some cat—some categories it is at the individuals option whether he wants to serve or not. Some excluded because of profession, is one.

Q All right. So, if I understand you, some people read over these questionnaires and they put aside the ones that show on their face some reason under statute why the person would not serve, is that right?

A Yes, sir.

Q And after you have gone through that sorting process, is any record kept of the reason why people would exclude themselves?

A No, sir.

Q All right. And as Mr. Fitzgerald said, I take it, these questionnaires are normally thrown away after you are through with them, is that right?

A Yes, sir.

Q When you select the names of people to send out the questionnaires in the fall, do you use any kind of public record besides the voter registration list for Jackson County?

A No, sir.

Q Okay. Is that because of the statute or because of any other reason or do you know?

A It's by direction of the Court Administrator.

Q All right. And you have never been directed to use any other types of records besides that?

A That's correct.

Q Okay.

MR. LARSON: That's all the questions I have.

CROSS-EXAMINATION BY MR. BELLEMERE:

Q Mr. Kramer, you heard the question the Judge asked Mr. Fitzgerald as related to this 25 per cent figure and whether or not any effort is made to get more of one sex than another sex in the 25 per cent, did you not?

A Yes, sir.

Q Is there any effort made to get more of one sex than another on a jury panel? I mean, in other words, not the jury panel, the jury wheel. When this selection has gone out, is there any action on your part that causes you to try and get more of one sex than another sex?

A No, it's just the luck of the draw. As I say, we select every fourth record and the records are in ward and precinct sequence so whether they are male, female, or whatever, whatever is the fourth record that we're selecting, that's the one that we select.

Q And each year, you change the number that you started with the year before.

A Yes, sir.

Q So your list is not the same. All right.

MR. BELLEMERE: I have no further questions.

THE COURT: Thank you, Mr. Kramer, you are excused.
(Witness excused)

MR. LARSON: That's all.

One other exhibit, Your Honor, which is marked Defense Exhibit 1, it's simply a Xerox copy of Commerce Department Census Data. Would you be willing to stipulate to that, Mr. Bellemere? The purpose of it is to show the breakdown by sex of the population of Jackson County.

MR. BELLEMERE: I'll stipulate that—what exhibit number?

MR. LARSON: Exhibit 1.

MR. BELLEMERE: I'll stipulate Exhibit 1 appears to be a General Population Characteristics of Missouri. It says 1970 Census of Population. I'll stipulate that that can be admitted into evidence.

MR. LARSON: I would offer Defendant's Exhibit 1.

THE COURT: It will be received.

(DEFENDANT'S EXHIBIT NO. 1, GENERAL POPULATION CHARACTERISTICS OF MISSOURI, WAS RECEIVED IN EVIDENCE)

* * *

THE COURT: Very well. Gentlemen, the points noted in the Motion for New Trial, as Mr. Larson has observed, were previously considered in the composition of the jury panel, this is a matter controlled by statute and the Court does not consider it appropriate at this time to sustain the motion on that basis and make that adjudication of the statute but would leave that for some higher court if found appropriate.

* * *

Consequently, for the reasons stated, the defendant's Motion for New Trial is overruled.

EXCERPT FROM DEFENDANT'S EXHIBIT NUMBER 1, INTRODUCED INTO EVIDENCE AT HEARING ON MOTION FOR NEW TRIAL

(From U.S. Department of Commerce Publication - 1970 Census of Population)
(General Population Characteristics--Missouri)

Table 35. Age by Race and Sex, for Counties: 1970 - Continued

[For minimum base for derived figures (percent, median, etc.) and meaning of symbols, see text]

Counties	1970 population					1960 population	1970 population					1960 population		
	All races			Negro			All races			Negro				
	White			Male	Female		White			Male	Female			
	Total	Male	Female				Total	Male	Female					
HOWARD	10 561	5 107	5 454	4 617	4 922	479	519	10 859	11 311	11 997	29	27	22 037	
Under 1 year	140	68	72	61	60	7	11	186	187	164	—	—	429	
1 year	144	72	72	65	66	6	6	190	183	157	—	—	430	
2 years	135	60	75	51	61	6	14	177	183	169	—	—	410	
3 years	136	68	68	59	55	9	13	187	167	153	—	—	437	
4 years	150	86	64	73	52	13	7	200	156	191	—	—	452	
5 years	163	86	77	70	69	15	8	198	176	173	—	—	420	
6 years	175	101	74	83	61	18	13	199	205	193	—	—	457	
7 years	177	97	80	80	66	17	13	202	214	190	—	—	472	
8 years	189	95	94	87	81	8	13	174	232	210	—	—	434	
9 years	173	87	86	73	77	14	9	169	238	217	—	—	422	
10 years	182	90	92	81	80	9	11	189	248	225	1	2	436	
11 years	189	102	87	87	79	14	8	177	238	231	1	1	453	
12 years	178	90	88	80	73	10	12	182	237	231	1	1	478	
13 years	190	96	94	80	79	16	13	182	264	215	—	—	437	
14 years	194	91	103	81	93	9	15	166	289	238	—	—	403	
15 years	197	101	96	86	86	15	9	148	228	214	—	—	392	
16 years	181	92	88	80	79	13	9	159	244	217	1	1	432	
17 years	182	101	81	88	69	13	12	152	214	228	—	—	427	
18 years	264	132	132	122	123	9	9	261	172	191	—	—	285	
19 years	291	134	157	127	148	7	8	261	163	157	—	—	226	
20 years	293	135	158	125	148	8	10	225	116	153	1	1	220	
21 years and over	6 638	3 122	3 516	2 878	3 207	240	301	6 875	7 028	7 850	14	16	13 475	
Under 5 years	705	354	351	309	299	44	51	940	841	834	—	—	2 158	
5 to 9 years	877	466	411	393	354	72	56	942	1 041	1 030	—	—	2 205	
10 to 14 years	933	469	464	409	409	58	54	896	1 275	1 138	3	5	2 207	
15 to 19 years	1 115	561	554	503	505	57	47	981	1 019	1 007	2	2	1 762	
20 to 24 years	963	493	470	467	437	23	31	721	579	654	3	2	1 050	
25 to 29 years	475	238	237	228	218	9	7	404	581	584	—	—	1 081	
30 to 34 years	421	200	221	182	192	12	28	510	556	609	—	—	1 163	
35 to 39 years	431	198	233	183	216	14	17	514	584	624	—	—	1 283	
40 to 44 years	505	263	242	244	241	19	23	554	625	685	—	—	1 349	
45 to 49 years	544	254	290	235	262	19	28	628	634	705	2	2	1 274	
50 to 54 years	526	253	273	236	248	17	24	624	636	716	4	5	1 359	
55 to 59 years	601	287	314	260	291	27	23	642	644	709	1	1	1 178	
60 to 64 years	593	285	308	266	283	19	25	618	655	749	3	3	1 065	
65 to 69 years	541	240	301	220	268	20	32	608	608	630	2	—	1 012	
70 to 74 years	475	216	259	194	231	28	28	515	422	494	—	—	863	
75 to 79 years	372	155	217	140	198	15	18	407	312	371	—	—	606	
80 to 84 years	267	100	167	87	157	13	10	213	245	244	—	—	324	
85 years and over	217	75	142	67	135	8	7	142	111	151	—	—	188	
Under 18 years	3 075	1 584	1 491	1 365	1 296	215	191	3 237	3 832	3 646	5	9	7 821	
18 years and over	2 232	961	1 271	702	864	97	107	2 235	2 029	2 353	4	2	3 632	
65 years and over	1 872	786	1 086	502	689	84	95	1 863	1 641	1 883	2	1	2 993	
Median age	32.5	29.4	35.4	30.0	36.1	21.8	30.6	35.3	33.0	35.5	50.0	42.5	32.4	
JACKSON														
All ages	9 539	4 642	4 897	4 604	4 857	24	18	8 041	654 558	309 421	345 137	254 457	283 141	622 732
Under 1 year	180	91	89	91	88	—	—	145	11 248	5 678	5 570	4 423	4 249	14 843
1 year	159	86	73	85	73	—	—	156	10 428	5 360	5 068	4 197	3 932	14 677
2 years	154	63	91	62	90	1	1	152	9 823	4 913	4 910	3 788	3 808	14 304
3 years	183	97	86	97	86	—	—	145	10 492	5 337	5 155	4 197	3 932	13 848
4 years	175	95	80	93	80	2	—	160	11 087	5 617	5 470	4 326	4 154	13 222
5 years	173	88	85	88	85	—	—	140	11 901	5 983	5 918	4 606	4 559	13 222
6 years	191	100	91	91	99	—	—	156	12 376	6 368	6 008	4 903	4 619	12 352
7 years	172	89	83	88	82	—	—	148	12 873	6 522	6 351	5 051	4 878	12 053
8 years	194	105	89	105	89	—	—	157	13 101	6 631	6 470	5 117	5 010	12 053
9 years	170	92	78	91	78	—	—	136	13 417	6 886	6 531	5 264	5 026	10 553
10 years	189	99	90	99	89	—	—	158	13 881	6 981	6 900	5 350	5 203	10 468
11 years	195	104	91	102	91	1	1	180	13 167	6 774	6 393	5 174	4 899	10 346
12 years	175	91	84	90	83	1	—	183	13 201	6 742	6 459	5 272	4 933	10 346
13 years	177	90	87	88	86	2	—	179	12 785	6 491	6 294	5 104	4 818	10 574
14 years	195	93	102	93	100	1	1	156	12 583	6 412	6 171	5 033	4 843	10 335
15 years	167	61	76	89	76	1	—	179	12 116	6 126	5 960	4 838	4 680	7 738
16 years	184	110	74	107	74	3	—	160	11 489	5 735	5 754	4 589	4 527	7 576
17 years	160	74	86	73	83	1	3	151	11 189	5 706	5 483	4 642	4 326	7 840
18 years	115	67	48	66	47	1	1	135	10 634	5 069	5 365	4 112	4 494	7 319
19 years	120	51	69	50	69	1	—	85	9 680	4 229	5 451	3 401	4 384	6 106
20 years	100	39	61	39	61	—	—	76	9 585	3 887	5 699	3 133	4 604	6 908
21 years and over	6 001	2 836	3 165	2 817	3 148	10	10	4 904	407 502	185 974	221 528	157 947	187 227	397 813
Under 5 years	851	432	419	428	417	3	1	758	53 078	26 905	26 173	20 921	20 111	71 169
5 to 9 years	900	465	435	463	433	4	2	737	63 668	32 390	31 278	24 941	24 092	89 899
10 to 14 years	931	477	454	472	443	4	2	856	65 617	33 400	32 217	25 933	24 695	99 772
15 to 19 years	746	373	373	385	349	7	4	710	55 108	26 855	28 243	21 582	22 411	39 466
20 to 24 years	599	266	333	265	331	—	—	357	51 457	22 550	28 907	19 069	24 002	37 409
25 to 29 years	606	299	307	299	306	—	—	354	45 451	22 456	23 995	18 942	19 784	38 382
30 to 34 years	495	240	255	239	253	—	—	383	37 648	18 416	19 232	15 393	15 581	43 157
35 to 39 years	456	245	211	244	200	1	2	417	35 995	17 397	18 598	14 598	14 999	43 950
40 to 44 years	460	227	233	224	232	1	—	425	38 729	18 670	20 059	15 743	16 452	39 031
45 to 49 years	436	213	223	211	222	2	1	502	39 417	19 112	20 305	16 167	17 078	37 422
50 to 54 years	505	242	263	239	262	2	1	490	34 859	16 200	18 659	13 912	15 870	20 209
55 to 59 years	562	266	296	266	293	2	2	401	31 617	14 565	17 052	12 499	14 759	32 956
60 to 64 years	538													

DEFENDANT'S EXHIBIT NUMBER 2, INTRODUCED INTO EVIDENCE AT
HEARING ON DEFENDANT'S MOTION FOR NEW TRIAL

(FRONT)

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Summons for Jury Service

To

YOU ARE HEREBY SUMMONED to appear before the Honorable

FOREST W. HANNA, Judge of DIVISION 13 of the

Circuit Court of Jackson County, Missouri

ANNEX

306 W KANSAS INDEPENDENCE RM 100, ON MONDAY THE 15

day of NOVEMBER, 1976 AT 8:30 o'clock AM to serve as a
juror until discharged.

IF YOU FAIL TO APPEAR YOU MAY BE HELD IN CONTEMPT OF COURT.
BRING THIS SUMMONS WITH YOU.

PLEASE READ THE INSTRUCTIONS ON REVERSE SIDE. JOHN R. FITZGERALD
(OVER) Jury Commissioner

NOVEMBER

15

PLEASE BRING THIS ENTIRE CARD WITH
YOU WHEN YOU APPEAR AT THE JURY
ASSEMBLY ROOM.

(REAR)

INSTRUCTIONS

Please note the Judge and location on the front side of this card. You must report to him on the day and at the time specified.

No male juror shall be excused from service except for sufficiently valid reasons to be APPROVED BY THE JUDGE or upon PERSONAL APPEARANCE BEFORE SAID JUDGE AS SHOWN ON THE FRONT OF THIS CARD. Applications for excuses must be presented to said Judge on or before 12 o'clock noon on the Thursday preceeding the date which you are to appear as shown on the reverse side.

A physically disabled juror must show that to appear and serve would endanger his health. Such proof must be in the form of a doctor's certificate and be presented to the Judge the same as other applications.

If you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible.

If you are over 65 years of age and do not wish to serve, return this summons to the Judge named on the reverse side the same as other applications, before 12 noon Thursday preceeding your date of service. Give your date of birth in your request.

If you are no longer a resident of Jackson County, Missouri, you are not eligible for jury service. Please let us know you have moved by returning this summons promptly giving your present address.

All persons duly summoned by mail as jurors may be attached for non-appearance and fined by the court for contempt.

Please note that we are unable to furnish parking for jurors.

Please bring this Summons with you when you appear at the Jury Assembly Room.

JURY COMSSR: 6500/ JURY COMSSR: 6500/9/75

DEFENDANT'S EXHIBIT NUMBER 3, INTRODUCED INTO EVIDENCE AT
HEARING OF DEFENDANT'S MOTION FOR NEW TRIAL

2	LAST NAME	42	FIRST NAME	37	38	39	40	41	DOB
3	23								
4	24 HOUSE #	33	31	32	33	34	35	36	
		NS	EW						

DO NOT WRITE ABOVE THIS LINE
FOR INTERNAL USE ONLY

OFFICIAL NOTICE AND QUESTIONNAIRE

(Not a Summons)

DEPOSIT.....L

AUG 13 1976

Enter change

of home address here: MAE RYALS (City or Town) (Zip Code)

(Number and Street or Rural Route)

You have been selected under the provisions of the Missouri statutes for jury service.

This questionnaire should be returned immediately.

The laws of the State of Missouri provide that if you do not answer and return this questionnaire, you are subject to citation for contempt.

The law further provides that if you knowingly and falsely answer any of the questions herein contained, you may be guilty of a misdemeanor.

The law requires your name to be placed in the jury wheel if answer is not received promptly.

BY ORDER OF THE BOARD OF JURY SUPERVISORS, UNDER AND BY AUTHORITY OF LAW.
ANN CLARDY,
Jury Commissioner

- (1) Please state your sex. Male (.....) Female (.....).
(If you are a female and do not wish to serve, see bottom of questionnaire).
- (2) Name of husband or wife.
- (3) Are you over sixty-five years of age? Yes (.....) No (.....).
- (4) Date of Birth. Month.....; Day.....; Year.....
Are you a member of the fire company or police department?
Yes (.....) No (.....). (If your answer is "yes", state which.)
- (5) Are you actually exercising the functions of clergyman or any professor or other teacher of any school of learning? Yes (.....) No (.....). (If your answer is "yes", state where you are so engaged.)
- (6) Are you a registered and licensed osteopathic physician, veterinarian or chiropractor? Yes (.....) No (.....).
(If your answer is "yes", state which.)
- (7) If you are a female, or if your answer to any of the above questions 3, 4, 5 and 6, is "yes", then under the law of Missouri, you cannot be compelled to serve as a juror, so state if you will serve. Yes (.....) No (.....).
- (8) Are you actually engaged in the practice of law, medicine or dentistry? Yes (.....) No (.....). (If so, please state which profession.)
- (9) Are you a member on active duty with any branch of the Armed Forces of the United States? Yes (.....) No (.....).
- (10) Is the address shown on the questionnaire correct? Yes (.....) No (.....). (If your answer is "no", state present address.)
- (11) Are you physically able to serve? Yes (.....) No (.....). (If not, attach physician's or authorized Christian Science practitioner's statement or you will be called.)
- (12) Have you served within the last year? Yes (.....) No (.....). (This will be checked if your answer is "yes".)

Signature

TO MEN OVER 65 YEARS OF AGE:

If you are over sixty-five and elect not to serve, fill out this paragraph and mail questionnaire at once to jury commissioner. It will not be necessary to answer the other questions.

Give date of birth Day Month Year
I elect not to do jury service.

Signature

TO WOMEN:

The constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service.

Signature

RETURN THIS
QUESTIONNAIRE
WITHIN 10 DAYS.

DEFENDANT'S EXHIBIT NUMBER 4, INTRODUCED
INTO EVIDENCE AT HEARING ON MOTION
FOR NEW TRIAL

TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR MARCH, 1976

Week Beginning:		Jurors Summoned	(%)	Excused	Deferred	Not Appearing	Appeared For Service	(%)
March 1, 1976.	Female	90	(72.0%)	56	2	13	19	(13.1%)
	Male	231	(28.0%)	64	21	20	126	(86.9%)
	Total	321		120	23	33	145	
March 8, 1976.	Female	107	(31.9%)	64	2	9	32	(21.8%)
	Male	228	(68.1%)	67	37	9	115	(78.2%)
	Total	335		131	39	18	147	
March 15, 1976.	Female	107	(31.2%)	62	3	17	25	(15.2%)
	Male	228	(68.8%)	58	23	15	140	(84.8%)
	Total	343		120	26	32	165	
March 22, 1976.	Female	50	(26.0%)	27	1	8	14	(15.6%)
	Male	142	(74.0%)	40	17	9	76	(84.8%)
	Total	192		67	18	17	90	
March 29, 1976.	Female	99	(28.6%)	65	3	11	20	(12.5%)
	Male	247	(71.4%)	70	27	10	140	(87.5%)
	Total	346		135	30	21	160	
TOTAL FOR WEEKS OF MARCH, 1976	Female	453	(29.5%)	274	11	58	110	(17.0%)
	Male	1,084	(70.5%)	299	125	63	597	(83.0%)
	Total	1,537		573	136	121	707	

NOTE: Defense Exhibits Nos. 5 and 6, being respectively the 1976 Petit Jury Wheel and the weekly attendance record of March 29, 1976, both introduced into evidence during the hearing on Defendant's Motion for New Trial held April 21, 1976, are not reproduced here due to their inordinately large bulk, but rather are available in the record for the Court's reference.

SENTENCING OF DEFENDANT

THE COURT: All right. It is the judgment and sentence of this Court that the defendant be confined for the period of his life for the offense of Murder in the First Degree in connection with an attempt to rob; said sentence to be served at such place of confinement as may be designated by the Missouri Department of Corrections.

It is the further judgment and sentence of this Court that the defendant be confined for the period of his life for the offense of Assault with Intent to Kill with Malice Aforethought; said life sentence to begin upon the expiration of the life term previously imposed herein, and said sentence, likewise, to be served at such place of confinement as may be designated by the Missouri Department of Corrections, to whom the defendant is ordered committed.

IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs

BILLY DUREN,
Appellant.

No. 59,914

OPINION—September 27, 1977

RENDLEN, JUDGE

Defendant, convicted of murder first degree and assault with intent to kill was sentenced to consecutive terms of life imprisonment. He appealed to the Missouri Court of Appeals, Kansas City district, raising questions of constitutional construction and because those issues fell within the exclusive appellate jurisdiction of the Supreme Court under Art. 5, §3, Mo.Const. as amended in 1976, the cause was transferred here prior to opinion. Two assignments of error are presented: (1) failure to quash the jury panel because Missouri's jury selection process systematically excludes women, and (2) erroneous joinder and trial of the murder and assault charges. We affirm.

The case arose from defendant's fatal shooting of Carrol Riley and wounding of Lee Kinnison during an attempted robbery at a United States Post Office in Jackson County, Missouri. Riley, attempting to thwart the crime, was shot in the head by defendant who turned and then shot Kinnison, a bystander. Sufficiency of the evidence to support the verdict is not challenged.

THE JURY SELECTION ISSUE

Defendant first contends his motion to quash the petit jury panel was erroneously overruled in that Art. I, §22(b), Mo.Const.¹ and its implementing statute § 494.031(2),

¹ Mo.Const. Art I, §22(b) provides: "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror."

R.S.Mo. Supp. 1975,² served to exclude women from the jury in such numbers as to render those sections invalid and destroy the panel's efficacy under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.³ The Sixth Amendment has recently been interpreted in *Taylor vs Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), to invalidate constitutional and statutory provisions of Louisiana relative to jury selection procedures. The voided sections were Art. VII, § 41 of the Louisiana Constitution:

"[N]o woman shall be drawn for jury service unless she shall have *previously filed with the clerk* of the District Court a *written declaration of her desire* to be subject to such service." (Emphasis supplied.)

and Art. 402, Louisiana Code of Criminal Procedure:

"A woman shall not be selected for jury service *unless she has previously filed with the clerk of court of the parish in*

²§494.031, R.S.Mo. Supp. 1975—Pertinent portions of the statute are as follows: "The following persons shall, upon their timely application to the court, be excused from service as a juror, either grant or petit: . . . (2) Any woman who requests exemption before being sworn as a juror; . . ."

³Women first became eligible for jury service in Missouri under the Constitution of 1945. Cases challenging jury composition on the basis of sex soon followed. In *State vs. Taylor*, 356 Mo. 1216, 205 S.W.2d 734 (1947), failure to include women among those summoned as prospective jurors was held not to be error on the rationale that the new state constitutional provision and implementing statutes permitted but did not require that women serve. To similar effect see *Parker vs. Wallace*, 431 S.W.2d 136 (Mo. 1968). Three years later, the selection of petit jurors from voter registration lists was held constitutionally permissible in *State vs. Parker*, 462 S.W.2d 737 (Mo. 1971), except in cases that result in the "systematic exclusion of a 'cognizable group or class of qualified citizens'" [l.c. 738]. That case relied in part on *Hoyt vs. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), which was later overruled in *Taylor vs Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Defendant argued in *State vs. Smith*, 467 S.W.2d 6 (Mo. 1971), that based on mathematical probabilities the exclusion of all women from seventy-one talesmen called, made a case of intentional discrimination, but the court reversing, deemed it unnecessary to rule the point as it found from the sheriff's testimony clear evidence of impermissible "intentional exclusion". More recently the court in *State vs. Wright*, 476 S.W.2d 581 (Mo. 1972), upheld Missouri's jury selection system against attack based on the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, finding no showing of sex-based class disparity had been made.

which she resides a *written declaration of her desire to be subject to jury service.*" (Emphasis supplied.)

Examining those constitutional and statutory provisions the Court stated, "Accepting as we do, however, the view that the Sixth Amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male" [l. c. 537, 95 S.Ct. l. c. 701]. Defendant had moved to quash the petit jury venire of St. Tammany Parish, where he was indicted, and in connection with his motion the following facts were stipulated: (1) 53% of persons eligible for jury service in the parish were women but not more than 10% of the names in the wheel were those of women; (2) during a period 4 months prior and six and a half months following trial, 1,800 names were drawn to fill parish petit jury venires and of that number only 12 (less than 1%) were female; (3) 175 male but no female names were drawn for jury service in April, 1972 (the month of trial); and (4) the disparity between eligible women and those included in wheel and venire resulted from the operation of the cited constitutional and statutory sections.

The thrust of *Taylor* is that no longer in criminal cases may women as a class be excluded from jury service or automatically exempted on the basis of sex, if as a consequence, jury venires are almost totally male. The Louisiana automatic exemption found constitutionally infirm required women to come forward and file with the district court clerk written declarations stating their desire or intention to serve as jurors, otherwise their names would *not* be included. Such affirmative action, not required of Louisiana male citizens, resulted in almost totally male criminal jury venires and the effective exclusion of females.

The Court made clear, however, that "[t]he States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community" [l.c. 538, 95 S.Ct. l.c. 701]⁴ Also, while juries must be drawn from a source fairly representa-

⁴To like effect see *Carter vs. Jury Commission of Greene County*, 396 U.S. 320, 332, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970).

tive of the community, no requirement was imposed "that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. . ." [l.c. 538, 95 S.Ct. l.c. 702].

Proper exemptions from jury service are permitted to promote the orderly and efficient operation of overloaded judicial systems. Under § 494.020, R.S.Mo. Supp. 1975, a number of classes are excluded from jury service.⁵ In addition to excluded classes, § 494.031 R.S.Mo. Supp. 1975, allows others to be excused on timely application to the court; for example, persons over 65 years of age; doctors of medicine, osteopathy, chiropractic and dentistry; clergy; professors and teachers in any school or institution of learning. Also, Art. I, §22(b) Mo.Const. mandates that the court shall excuse any woman requesting exemption before being sworn, and this provision is implemented by § 494.031(2), R.S.Mo. Supp. 1975. It is this female privilege to opt for excuse from jury service toward which defendant directs his complaint.

Examining defendant's contention, we first must emphasize that in Missouri, women's rights to serve on juries are fully protected and equal to those of men. Art. I, §22(b) Mo.Const. provides that "[n]o citizen shall be disqualified from jury service because of sex. . . ." Thus the rights of Missouri's male and female citizens to serve as jurors, without class discrimination, are constitutionally insured. This constitutional guarantee against gender based disqualification is a far cry from equal protection cases cited by defendant for example, the stigmatized blacks of Georgia whose more than 24 year exclusion from jury service was condemned in *Norris vs Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935), and which led to adoption of the "rule of exclusion" in race discrimination cases. Nor does our system discriminate against either sex in the manner the rights of Mexican-Americans to serve on juries were denied by the jury commissioners' conduct in *Her-*

⁵§494.020, R.S.Mo. Supp. 1975, describes many excluded classes, some of which are: those unable to understand the English language persons on active duty with the Armed Forces of the United States; licensed attorneys; judges of courts of record; persons suffering mental or physical illness or infirmity rendering them incapable of performing the duties of a juror.

nandez vs. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954). Neither do we have the highly subjective key man jury commissioner scheme of *Hernandez*, described as "susceptible to abuse" and "purposeful discrimination" in *Castaneda vs. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed2d 498 (1977), nor the non-random culling process by which class designations were emphasized in *Alexander vs. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). *Castaneda*, not decided when this case was argued, and *Alexander*, not cited by defendant, are illustrative of the elements and problems of proof in equal protection based jury challenges. Finally, our jury selection process is quite dissimilar from the peculiar, "racially" controlled multi-layered Georgia system for school board and jury selection criticized in *Turner vs. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970).

The suspect practices condemned in those cases as denying equal protection because of invidious discrimination are neither condoned nor permissible in the jury selection system of Jackson County. The right of each class (men or women) to serve is equal. While members of either class may for cause shown, request and be granted exemption, in the case of women excuse from duty is more easily obtained, as a bare request suffices. However, the case confronting the Court in *Taylor* was one in which women as a class were denied such right to serve, absent affirmative action not required of men. For women in Louisiana, jury selection had been aptly described as a "volunteer" system, limited to those who filed declarations and asked to be included in the list. The Court however, recognizing the absence of susceptibility to abuse or purposeful discrimination in the system common to the "equal protection" cases cited above, based its determination not on equal protection considerations but instead on Sixth Amendment provisions for jury trial as that amendment binds the states under the due process clause of the fourteenth Amendment. See *Duncan vs. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

The cited Missouri statute, § 494.031, R.S.Mo. Supp. 1975, and Art. I, §22(b) of the Constitution are not within the ambit of *Taylor* for two reasons. First: The Louisiana scheme impaired the *right* of the affected class. On the other hand, the *right* of Missouri women to jury service

remains inviolate though they enjoy an expanded privilege to seek exemption and both sexes are automatically included in wheel and panels unless affirmative action is taken to be excused. In short, ours is not the automatic gender exclusion invalidated by *Taylor*, thus the presumption of constitutionality attaching to state procedures has force here. Second: Equally important to the outcome of this case is the fact that the *results* of Louisiana's jury selection scheme contrast sharply with those of the selection process in this case. Before comparing the *results* of the two systems, we must first examine the mechanics of the Jackson County process from the proof appearing in the record.

Defendant submitted 1970 Jackson County census figures reflecting approximately 407,000 county inhabitants over 21 years of age, with 54% (221,000) women and 46% (185,000) men, urging that we assume this gender distribution of Jackson County population from 1970 to 1976, and the Jackson County annual jury selection process begins with current voter registration lists, not 1970 census figures. Thus the gross population and percentage figures offered by defendant appear patently overinclusive for the purpose here. This overinclusiveness is in part demonstrated by the following: No proof was offered that the sexes registered to vote in direct relation to their numbers; also, those 18 years and older are eligible to register which further distinguishes the 1976 voter registration lists from the 1970 (21 years and older) census figures defendant asks us to consider; in addition, the fluidity of voter registration lists reflects the constantly changing population patterns, and it was argued by respondent that percentage-wise more men normally register than women. All of this suggests that statistics of current "eligible population" referred to in *Alexander vs. Louisiana*, *supra*, not 6 year old gross population figures, provide the proper starting point.

Though defendant seems to have fallen short in his burden of establishing constitutional invalidity, assuming arguing that 54% of the 1976 voter registration lists (as in the 1970 census gross population figures) were female and assuming that all on the lists were eligible jurors, the 1976 Jackson County jury selection process was as follows: (1) By questionnaires, jury commissioners randomly canvassed 70,000 names of the county voter registration lists. The

questionnaires notified those canvassed of women's privilege to elect not to serve. (2) From returned questionnaires, the 1976 wheel or master jury list was compiled containing 30,000 names of men and women apparently qualified for jury duty; however, no information was adduced of the wheel's gender distribution except an unverified pencil note on Exhibit #5 (the computer print-out of the wheel) showing 29.1% women. (3) From the wheel, jury panels were summoned on a random basis each week and those summoned were notified of the female option to decline service. (4) For the periods June through October, 1976 and January through March, 1976, approximately 11,197 persons were summoned for jury duty and of that number 2,992 or 26.7% were women. (5) Of those summoned, 5,119 persons appeared and of that number 741 or 14.5% were women.

In March, 1976 (the time of trial), 1,537 were summoned for jury duty and of that number 453 or 29.5% were women and of 707 appearing 110 or 15.5% were women.⁶ These figures reflect a dramatically higher percentage of female representation in wheel and panels than condemned in *Taylor*. There, only 10% of the wheel was female and 1,800 persons drawn in St. Tammany Parish during the relevant ten and a half month period (four months prior and six and a half months after the trial), only 12 (less than 1%) were female and we are not informed if any of them appeared during the entire ten and a half months. This stands in marked contrast to the fact that during the month of defendant's trial, 29.5% of all venirees summoned in Jackson County and 15.5% of those appearing for trial were female.

We are not told the number of women requesting exemptions but we do know that women originally canvassed who failed to return the questionnaire were automatically deemed eligible and included in the wheel. Those who claimed exemption could do so for a wide array of reasons other than the fact of their sex. For example, school teachers and government workers, whose jobs typically attract substantial numbers of women, may decline to serve under R.S.Mo. Supp. 1975, § 494.031(5) and (7) respectively. We know from *Taylor*, 419 U.S. at 535 n. 17, 95 S.Ct. 692 that Department of Labor statistics indicate that

⁶The panel of 53 in this case included 5(9.4%) women, and the final 12 were male.

in October of 1974, 54.5% of all women between 18 and 64 years of age were in the labor force. Additionally, 61% of persons over 65 are women who may have declined to serve only for reasons of age under § 494.031(1), R.S.Mo. Supp. 1975, which inferentially reduces the ranks of eligible female jurors whom defendant insists opted off for reasons of sex. Regardless of these matters highlighting defendant's evidentiary shortcomings, which reasonably would diminish the percentage of females who might have sought sex-based exemptions, the number of female names in the wheel, those summoned and those appearing were well above acceptable constitutional standards.⁷

⁷Citing *Turner vs. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), decided on equal protection grounds, defendant urges that error in the trial court's failure to quash the jury panel appears from the statistics alone, but neither *Turner* nor subsequent cases support this position. See *Alecander vs Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972).

Turner was a civil case brought by Negro residents involving Georgia's peculiar system of selecting the Taliaferro County Board of Education. The scheme provided for a County Board of five free-holders selected by the grand jury, which in turn was drawn from a jury list selected by the six county jury commissioners who were appointed by the State Superior Court Judge for the circuit in which the county was located. Statistical evidence showed 60% of Taliaferro County residents were Negro against 37% Negro representation in the questioned lists from which the grand jury was chosen. At every layer of the selection system white citizens were in total control, though all students in the county schools were Negro.

The trial court found that until suit was instituted "Negroes had been systematically excluded from grand juries through token inclusion." Against this background of pervasive discrimination the Court determined that a newly drawn grand jury list with 37% Negro representation, though of less racial disparity than previous lists, was nevertheless the product of continued purposeful discrimination. The prior list of 130, withdrawn after suit was filed, had contained only 11 Negro names. While the selection scheme was not found facially unconstitutional, the opportunity for discrimination was present. A number of citizens were declared unqualified by the white commissioners for lack of "intelligence" or "uprightness" and 178 persons (of whom 171 were Negroes) were so stricken.

From these and related facts, the Court concluded appellant made a prima facie case of purposeful discrimination. The disparity occurred at the point where subjective standards were applied setting the stage for the finding of pervasive discrimination which when coupled with statistical showing of underrepresentation led to reversal. Such purposeful or

The impediment of the Louisiana female "volunteer" or automatic exclusion system, was coupled with statistics showing sufficient sex disparity to work reversal. However, the Louisiana system did not contain the opportunity for subjective selection or discriminatory conduct by those in control of the system as in the previously cited equal protection cases, and the process was invalidated only on a strong showing that criminal jury venires were "almost totally male." Accordingly, we cannot say the jury selection process in Missouri and the resulting venires were violative of that standard enunciated in *Taylor*.

Defendant next challenges the system and its results as violative of the Fourteenth Amendment and makes an ambiguous argument referring to the "methodology approved in *Hernandez vs. Texas*," *supra*. *Hernandez* was a case turning on denial of "equal protection" and from this we assume defendant is directing his argument to that clause of the Fourteenth Amendment.⁸

In *Hernandez*, a Mexican-American and a member of the prejudiced class proved that for 25 years no person of Mexi-

pervasive discrimination, neither suggested nor shown here, distinguishes the case as bar from *Turner* and renders the percentage of negro participation in Georgia inapplicable here. In the disparity cases, as distinguished from those involving exclusion [e.g., *Hill vs. Texas*, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942)] the Court typically has held a prima facie case is not made on the basis of statistics alone. In such cases, we find not only substantial disparity between the numbers of the eligible class and those included in the list, but also the opportunity in the selection procedures for discriminatory conduct calculated to produce the underrepresentation.

⁸A question arises concerning this male defendant's standing to raise an "equal protection" claim against the alleged exclusion of women from his jury. It was settled in *Taylor vs. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), that such claims when couched in the Sixth Amendment and Fourteenth Amendment due process terms, may be made by one not a member of the excluded class. However, a male defendant's standing to challenge alleged exclusion of female jurors as a denial of Fourteenth Amendment equal protection rights was not decided by *Taylor*. A male defendant's standing to raise that issue is at best tenuous. In *Peters vs. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), a white defendant challenged his conviction on due process and equal protection grounds stemming from the systematic exclusion of Negroes from the grand jury that indicted and the petit jury that convicted him. The Court noted that the question of standing for one not of the excluded class has never before been decided by the

can or Latin American descent had served on grand or petit juries or as jury commissioners in Jackson County, Texas, though 14% of the county population were of this class and it was stipulated that at least "some" had the legal prerequisites for such service. The Court invoked the "rule of exclusion" articulated in *Norris, supra*, because of the clear proof of long term class exclusion from jury service. From the 25 year exclusion and the systems' inherent opportunity for subjective discrimination, a presumption of equal protection denial arose, not rebutted by the jury commissioners' general assertion that they sought to select "those whom they thought were best qualified" [347 U.S. l.c. 481, 74 S.Ct. l.c. 672]. Though the Texas selection system was "fair on its face" it was "susceptible to abuse" and being "employed in a discriminatory manner" [l.c. 478-79, 74 S.Ct. 667]. This, plus a history of total exclusion, gave rise to the unsuccessfully abutted presumption.

No such exclusion or subjective discriminatory treatment at the hands of jury commissioners occurred in the case at bar. The names in both wheel and panels were picked at random from the registered voter lists. Women were not excluded nor (as heretofore discussed) were their *rights* to jury service diminished. Neither was the freedom of men to this cherished *right to serve* reduced or diluted in any way. The *rights* of each class were and are equal. While it might be argued the *duty* of men to serve is increased if women elect to opt off, men as a class may not reasonably be heard

Court and that a number of state and lower federal courts had imposed a "same class" rule on challenges to discriminatory jury selection holding that the exclusion of a class from jury service is subject to challenge only by a member of the excluded class. However, the Court in *Peters* upheld defendant's standing to challenge the validity of the exclusion, when that challenge bottomed on a claimed denial of "due process of law" [l.c. 504, 92 S.Ct. 2163]. Thus while we may say with certainty male defendants have standing to raise Sixth Amendment jury questions and Fourteenth Amendment due process claims in cases where females are systematically excluded from the venire, standing of male defendants to raise "denial of equal protection" issues in such cases has not been decided and we find no binding authority for such proceedings. To the contrary, the Court has held "there is nothing in past adjudications suggesting that petitioner himself [a male] has been denied equal protection by the alleged exclusion of women from grand jury service." *Alexander vs. Louisiana*, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972).

to complain that an added opportunity to participate in the system, which increases a cherished long-sought right, effects an equal protection denial for their class rising to a constitutionally impermissible level. Similarly, women may not be heard to claim a violation of equal protection when, while enjoying full rights to serve, by their free choice elect for a variety of reasons not to serve. This is a privilege declined, not right diminished.

The question then becomes, whose rights are constitutionally affected? Since neither men nor women as a class may make a valid denial of equal protection claim, from the defendant's point of view this is not a problem best defined as one of "equal protection." Instead, as in *Taylor*, the question for the individual defendant is set in terms of his rights to a jury representative of the community under the Sixth Amendment made applicable to state procedure by the due process clause of the Fourteenth Amendment. We have previously discussed defendant's contention in that context and determined there has been no denial of such right. Defendant's first assignment of error is denied.

THE JOINDER AND SEVERANCE ISSUES

Defendant next contends the court erred permitting joinder of two charges against him in a single indictment and compounded the error by denying his motion for severance, thereby forcing him to defend both counts in the same trial.

The charges of murder in the first degree for killing Riley, and assault with intent to kill for shooting Kinnison were part of the same transaction, the attempted robbery. Joinder of the charges as separate counts of the indictment is expressly permitted by Rule 24.04, as amended in 1971.⁹ See *State vs. Baker*, 524 S.W.2d 122 (Mo. banc 1975). The shootings occurred at the same place, in close succession and in connection with defendant's scheme to rob. Though each was a separate criminal offense, both were parts of the same transaction and by stating them in separate counts the state cannot be said to have attempted splitting a single

⁹Rule 24.04, effective July 1, 1971 provides in pertinent part: "All offenses which are based on the same act or on two or more acts which are part of the same transaction or on two or more acts or transactions which constitute parts of a common scheme or plan may be charged in the same indictment or information in separate counts, or in the same count when authorized by statute."

crime to prosecute in separate parts. This court made clear in *Baker* that a criminal defendant has neither a federal nor a state constitutional right to be tried on only one offense at a time. Referring to Rule 8 (a) of the Federal Rules of Criminal Procedure of similar effect as our Rule 24.04, the court at page 126 stated: "This rule has been described as constituting essentially a restatement of statutory and familiar law and as not violating due process of law." In that case, involving a three count information, defendant requested the counts be tried together, effectively waiving any objection to the single trial of multiple charges but on appeal defendant contended such procedure was constitutionally impermissible. Rejecting this contention for reasons other than the apparent waiver, the court held that joinder of charges and trial of the separate offenses in a single proceeding was properly permitted.

Defendant invites us to find that the 1971 amendment to Rule 24.04 affects substantive rights and thus was promulgated in violation of Art. V, § 5 of the Missouri Constitution¹⁰ rendering the joinder of counts and failure to sever erroneous and asks us to order reversal of the convictions. We decline the invitation for reasons stated in *Baker*, *supra* at 127:

"Rule 24.04 is a *procedural* rule. It, like Rule 8(a) of the Federal Rules of Criminal Procedure, merely permits joining in one information or indictment certain related multiple offenses which otherwise would have been charged separately. It does not mandate any difference in treatment between those charged jointly and those charged in separate informations or indictments. It makes no provision with respect to the amount of punishment to be imposed or whether sentences shall be concurrent or consecutive." (Emphasis added.)

It may no longer be questioned that in a proper case of offenses joined in a single indictment or information may be tried together. See *State vs. Morgan*, 539 S.W.2d 660 (Mo.App.1976), for a discussion of the rationale of *Baker* as it relates to *Ashe vs. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), and the Fifth Amendment guarantee

¹⁰Mo.Const. Art. V, § 5—"The supreme court may establish rules of practice and procedures for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. . . ."

The 1976 revision to this article does not affect the issue here.

against double jeopardy. The Supreme Court of Arizona in *State vs Pierce*, 59 Ariz. 411, 129 P.2d 916 (1942), considered an attack on its rule authorizing joinder of different offenses under separate counts, charging it was violative of a defendant's substantive right in a criminal proceeding. The court rejecting this contention commented that defendant had not suggested any manner wherein the rule violated any substantive right and concluded "and we can think of none. The *method* of trial of the defendant in a criminal case, in a civil, is procedural and not substantive . . ." [l.c. 917].

The remaining question concerns denial of defendant's motion for severance. Defendant bases his contention on the single argument that current Rule 24.04 is void; and from this he concludes the joinder was error, requiring severance. As noted above, the joinder was proper and defendant's major premise in this argument fails.

Further, severance is matter within the sound discretion of the trial court directed toward achieving a fair determination of the defendant's guilt or innocence of each offense charged. The court should consider, among other relevant factors, the number of offenses charged, the complexity of the evidence to be offered and whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. The court remains under a continuing duty during trial to counter prejudice and order severance if necessary to achieve the fair result intended. Defendant has neither suggested nor has our examination of the record disclosed any abuse of discretion in denial of the requested motion for severance. This contention of error is denied.

The judgment of the trial court is affirmed.

MORGAN, C. J., and HENLEY and FINCH, J. J., concur.

DONNELLY, J., concurs in result.

BARDGETT, J., dissents in part and concurs in part in separate opinion filed.

SEILER, J., dissents in separate dissenting opinion filed.

BARDGETT, Judge (concurring in part and dissenting in part).

I concur in that part of the principal opinion dealing with the jury selection issue. I dissent from that part of the opinion styled, "THE JOINDER AND SEVERANCE ISSUES", in which the court holds that Rule 24.04, in authorizing joint trial of separate offenses over a defendant's objection, is a constitutionally proper exercise of this court's rulemaking power under art. V, sec. 5, Mo. Const., as amended, and that a defendant is not entitled to a severance as a matter of right.

The right to be tried for separate offenses is, in Missouri, a substantive right which is subject to change only by statute. *State vs Terry*, 325 S.W.2d 1, 4 (Mo. 1959), and not by court rule. My reasons for so concluding have been set forth in my dissenting opinion in *State vs Neal*, 514 S.W.2d 544 (Mo. banc 1974), and my concurring opinion in *State vs Baker*, 524 S.W. 2d 122 (Mo. Banc 1975).

In addition to the reasons stated in my separate opinions in *Neal* and *Baker*, the reasoning of Henley, J., and the court's holdings in *State vs. Bursby*, 395 S.W. 2d 155 (Mo. 1965), support the conclusion that a right to a severance of counts alleging separate crimes is a substantive matter in Missouri.

In *Bursby*, the defendants (Bursby brothers) were charged in one information with three counts as follows: count 1—burglary of the Terry Town Store building owned by Lonus Speight and stealing therefrom; count 2—burglary on the same date of a tin grainery owned by Speight, located near the Terry Town Store, and stealing therefrom; and count 3—stealing of Speight's cement mixer located near the store building. The defendants, without counsel and upon waiving counsel, entered a plea of guilty to the information after being told by the judge they were charged with "a felony;" that they were entitled to a jury trial and counsel, etc. The court sentenced them to a term of four years on each of the three counts, the sentences to run consecutively. The Bursby brothers thereafter filed a 27.26 motion which was denied without hearing and the appeal came to this court.

This court granted relief holding that a person could be tried and convicted of only one felony at a time. The court said at 157-158:

"The offenses of burglary, and stealing in connection with such burglary, although separate and distinct crimes, may

be joined in one information, and an accused may be tried and convicted of both offenses in one trial only because the rule and statute authorize and permit such as an exception to the general rule; the general rule being that an accused may not be charged, tried and convicted at the same time of two separate and distinct offenses. *State vs. Preslar*, 316 Mo. 144 290 S.W. 142 and cases there cited; *State vs. Terry*, Mo., 325 S.W.2d 1, 4 [3], and cases there cited."

And, quoting from *State vs. Preslar*, 316 Mo. 144, 290 S.W. 142, 143-144, *Bursby* further stated at 158-159:

"* * * In justice to all parties concerned, we think the matter should be disposed of as though counsel for appellant made no request of the court to require the prosecuting attorney to elect upon which of the four counts he would proceed, until the filing of the motion for a new trial, as aforesaid. On the other hand, the [trial] court ruled it was not required to order an election under the laws of this state. We hold that, under the rulings of this court, the question of election is not a mere matter of form, which may be waived, as claimed by the state, *supra*, but it involves a question of jurisdiction and power. This principle of law was announced with great clearness and force by Judge Gantt in the leading case of *State vs. Carragin*, 210 Mo. [351] loc. cit. 371, 109 S.W. [553] 558, (16 L.R.A. [N.S.]561) where he said: 'In instructing the jury that they might find the defendant guilty under both counts, and in refusing to require the prosecuting attorney to elect after all the evidence was in, the court committed reversible error. We know of no case under our practice in which an accused may be tried and convicted of two distinct felonies except in the case of burglary and larceny, which is expressly allowed by statute.'

"The law, as above written is fully sustained by other decisions of this court, as follows: *State vs. Guye*, 299 Mo. [348] loc. cit. 366, 252 S.W. 955; *State vs. Link* [315 Mo. 192], 286 S.W. 12 et seq.

"We have no hesitation in holding that, on the record before us, the judgment of conviction in which defendant has been sentenced to the penitentiary for 8 years on four separate counts of the information, cannot stand the test of judicial criticism, under the laws of this state. We are of the opinion that it was the absolute duty of the trial court in this case, whether requested or not, to have directed the prosecuting attorney, before submitting the case to the jury, to elect on which of the four counts in the information he would proceed to trial and to strike out the remainder. In addition to foregoing, as a part of the state's case, whether re-

quested or not, it was the imperative duty of the court to instruct the jury that they could not find the defendant guilty except on the single count submitted for their consideration. *State vs. Burell*, 298 Mo. [672] loc. cit. 678, 679, 252 S.W. 709, and cases cited."

Art. V, sec 5, Mo. Const., says that the rules of practice and procedure "shall not change substantive rights." The principal opinion follows the observation of Finch, J., in *Baker, supra*, to the effect that Rule 24.04 is a rule of procedure. That observation is sound, in my judgment, and one with which I do not disagree, but it is not dispositive of the issue which the constitution puts to us. The point is that Rule 24.04 is a rule of procedure which *changes* the substantive right of criminal defendants to have separate trials for separate offenses, a right which was the practice of our courts to honor prior to the promulgation of the rule.

What is a "substantive" right? Former Governor Guy B. Park, who introduced the amendment which later became art. V, sec 5, at the 1943-44 Constitutional Convention, described substantive rights as "rights guaranteed by the Constitution of this state and of the nation. The rights that have been established by custom and by common law—they shall not be abridged, enlarged nor modified." XIII Debates of the Missouri Constitution 1945 at 3824.

The Convention considered an amendment to that which became sec 5 which would have granted unlimited power to the Supreme Court to promulgate rules of practice and procedure. Delegate Garten, speaking as one "unreservedly opposed to this amendment," suggested that it was "too great a delegation of power" which fails to "give the Legislature the power to annul or amend *some rule which may endanger private rights*." XIII Debates of the Missouri Constitution 1945 at 3875. (Emphasis added.) The amendment was defeated by a voice vote.

In *Maurizi vs Western Coal & Mining Co.*, 321 Mo. 378, 11 S.W.2d 268 (banc 1928), we described as substantive law "that part of the law which creates, defines and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion." *Id.* at 272. See also *Shepherd vs Consumers Cooperative Association*, 384 S.W.2d 635 640 (Mo. banc 1964); *Barker vs St. Louis County*, 340 Mo. 986, 104 S.W.2d 371, 3770378 (1937); *Ambrose vs State Department of Public Health & Welfare*, 319 S.W.2d 271, 274

(Mo.App.1958); *Poyser vs Minors*, 7 Q.B.D. 329, 333 (1881).

Was the general rule prior to our adoption of Rule 24.04, as enunciated in *Bursby*, *supra*, a rule of "substantive" dimension? I believe the answer to be yes.

In seeking to understand the origin of our general rule prior to 24.04, it has been necessary to examine the foundation for the decisions wherein the old rule was reaffirmed. *Bursby* relies on *State vs Terry*, *supra*, and *State vs Pre-slar*, *supra*, which rely on *State vs Carragin*, 210 Mo. 351, 190 S.W. 553 (1908), which relies on *Mayo vs State*, 30 Ala. 32,33 (1857), and *Mayo* relies on *State vs Nelson*, 8 N.H. 163, 165 (1835), which states: "[N]o court ever permits a prisoner to be tried for two distinct and separate crimes upon one indictment; because by such a course he might be confounded in his defense, and the minds of the jurors distracted."

Nelson finally relies upon *Young vs The King*, 3 D.&E. 98 (K.B.1789), which says at 106 per Buller, J., that the rule exists "lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a jurymen's trying one of the offences, though he might have no reason to do so in the other. . . . I thought it the soundest way of administering justice . . . in order to give a prisoner a fair trial."

What our Rule 24.04 changed was a rule which existed "in order to give a prisoner a fair trial." I cannot imagine a rule of greater substantive import. It is not relevant that Rule 24.04 can be described as procedural. After all, "[t]he history of American freedom is, in no small measure, the history of procedure." *Malinski vs New York*, 324 U.S. 401, 414, 65 S.Ct. 781, 787, 89 L.Ed. 1029 (1945) (Frankfurter, J.). A procedural rule can affect and change substantive rights. In my judgment, our Rule 24.04 does so, and is thus beyond our constitutional authority.

In my opinion, it was error to deny defendant's motion for severance. It should have been granted. See concurring opinion of Donnelly, J., in *Neal*, *supra*, at 550.

SEILER, Judge (dissenting).

I join in the dissent of Bardgett, J., on the question of our lack of authority to promulgate rule 24.04 for the rea-

son that it is a procedural rule which changes substantive rights and dissent further on the question of whether our provision permitting women to exempt themselves from petit jury services, Art. I, §22(b), Mo.Const.¹ and §494.031(2) R.S.Mo. Supp. 1975, survives the challenge of *Taylor vs Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) and the equal protection clause of the United States Constitution. I believe it does not and that the judgment of conviction should be reversed and the cause remanded for this reason also.

The principal opinion is in error, in my judgment, in proceeding on the premise of an alleged "right of Missouri women to jury service" which "remains inviolate though they enjoy an expanded privilege to seek exemption. . . ." No such "right to serve" exists. Many qualified citizens will never sit on a jury. No one has a right to insist that he or she, in particular, be summoned for jury service or serve on a jury.

Rather, a criminal defendant's right to a trial by jury, applicable to the states under due process clause of the Fourteenth Amendment, *Duncan vs. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), includes the right to "a fair possibility for obtaining a representative cross-section of the community." *Williams vs. Florida*, 399 U.S. 78, 100, 90 S.Ct. 1893, 1906, 26 L.Ed.2d 446 (1970). To this right is attached a correlative duty on the part of those citizens called to serve, see *Hohfeld*, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 Yale L.J. 16, 30-32 (1913). Jury service, in short, "is not a right or privilege which may be claimed, but is an obligation imposed by law upon those who come within a designated class possessing the required qualifications." 47 AM.Jur.2d *Jury* § 90 (1969).

The principal opinion denies the alleged unconstitutionality under *Taylor* of our scheme for the voluntary exemption

¹The constitutional exemption for women was the subject of extended debate at the Constitutional Convention, VI Debates of the Missouri Constitutional Convention 1788-1814 (1943-44). A motion to remove the exemption lost 31-32, with the chair casting the deciding vote. Id. at 1814. One of the principal objections voiced by those who would remove the exemption was that if women were permitted to avoid jury duty by self-exemption, the objective of a representative cross-sectional jury would not be realized.

of women from jury duty for two reasons. One is that "the right of Missouri women to jury service remains inviolate." As I have noted, no such "right" exists. The fact that the *duty* remains inviolate is not dispositive: the duty of women to serve remained inviolate under the Louisiana system, which was nonetheless found unconstitutional in *Taylor*. The second reason is that "the results of Louisiana's jury selection scheme [held unconstitutional in *Taylor*] contrast sharply with those of the selection process in this case."

The principal opinion observes that the fact that only 14.5-15.5 percent of the jury panels in the relevant period in Jackson County were made up of women (1) represents "a dramatically higher percentage of female representation . . . than that condemned in *Taylor*" where less than one percent of the jury panels during the relevant period were made up of women, and (2) is nevertheless explainable "for a wide array of reasons other than the fact of their sex," such as, for example, the exemptions permitted of school teachers and government workers "whose jobs typically attract substantial numbers of women" or that permitted to persons over age 65, 61 percent of whom are women.

The rule in *Taylor* is that "it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequences is that criminal jury venires are almost totally male." 419 U.S. at 537, 95 S.Ct. at 701. It is not necessary to show a governmental intent to discriminate against women, but only to evaluate the "systematic impact" of our system upon defendants' rights. *Taylor vs Louisiana*, *supra* at 524, 95 S.Ct. 692. The findings before us show that 85 percent of the relevant jury panels in Jackson County were male. No excuse, whether derived from the observations of this court of the role of women in our society or from a percentage comparison of the Louisiana and Missouri systems, can overcome the end result of our gender based exemption. Eighty-five percent or approximately six men to one woman is, to me, "almost totally male." I simply cannot understand it to be otherwise. The *Taylor* case does not say that anything more than one percent women is constitutional. The situation in Jackson County is not as bad as it was in St. Tammany Parish, but it does not have to be in order to fit the description "almost totally male."

In Jackson County, Missouri, the right of the women to exemption is given considerable prominence, first in the

Official Notice and Questionnaire and next in the summons for jury service. In each she is invited to excuse herself. "[O]nce a woman was informed of her right to automatic exemption, the likelihood that she would be a willing participant in the administration of justice declined markedly." Comment, 41 Mo.L.Rev. 446, 454 (1976). See *People vs Moss*, 80 Misc.2d 633, 366 N.Y.S.2d 522 (Sup.Ct.1975).

In the case before us and in the four other cases which were argued along with it, involving five criminal trials in Jackson County, between April 1975 and March 1976, using the jury selection system outlined in the principal opinion, the record showed that a maximum of 15 percent of any jury panel were women.²

Contrast this with the federal court in the Western Division³ of the Western District of Missouri, where the court has no automatic exemption for women, 28 U.S.C. §§ 1861, et seq. (1970), 1968 Federal Jury Selection and Service Act. There according to recent statistics 53 percent of the persons on the master wheel and 39.8 percent of the actual jurors were women, J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitments to Representative Panels 357 (1977). Yet aside from the unlimited self-exemption provision for women,⁴ there is no significant difference between the two court systems as to groups or occupational classes which are excused from jury service.

²The other four cases were as follows: In *State vs Harlin*, Mo., 556 S.W.2d 42, of the persons summoned and who appeared as prospective jurors during the week of defendant's trial, only 9.2 percent were women. In *State vs Davis*, Mo., 556 S.W.2d 45, it was 15 percent women. In *State vs Lee*, Mo., 556 S.W.2d 25, it does not appear how many of the 300 summoned appeared, but on the panel of 90 for the defendant's case, only 10 percent were women. In *State vs Minor*, 556 S.W.2d 35, it does not appear how many jurors were summoned but of the 55 on the defendant's panel, only 10.9 percent were women.

³The Western Division includes Jackson County and ten other counties. Two thirds of the population of the division is in Jackson County. See Population of Counties, Official Manual of State of Missouri, 1975-1976, Table 3, commencing at page 1217.

⁴Instead, the federal court provides for excuse on request by a woman charged with care of minor children without adequate domestic help. Amended Plans of the United States District Court for the Western District of Missouri for Random Selection and Service of Grand and Petit Jurors § 14(i) (1972).

"In a complex society such as ours, a jury that is the true 'conscience of the community' must include a fair cross-section of the groups that make up the community. Each person comes to the jury box as an individual, not as a representative of an ethnic, racial, or age group. But since people's outlooks and experiences do depend in part upon such factors as socioeconomic status, ethnic background, sex, or age, to ignore such differences is to deny the diversity in society as well as the fundamental character of the 'community' whose voice is to be heard in the jury room. So, although each juror's individuality must be respected (in fact, the system counts on jurors trying to overcome their prejudices to judge a case on its own merits), the juror's identification with certain demographic groups must be respected." J. Van Dyke, *supra* at xiv.

The principal opinion, finally, deals briefly with appellant's claim under the equal protection clause of the Fourteenth Amendment. The problem of defendant's standing to raise the equal protection claims of himself or of third party males who would allege a disproportionate burden in violation of their equal protection guarantees is indeed a serious one. Under current United States Supreme Court doctrine it is speculative as to how such a standing question might be resolved, granting that the principle of a representative jury is a requirement of equal protection, *Smith vs Texas*, 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84 (1940). See *Craig vs Boren*, 429 U.S. 190 193-97, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Peters vs Kiff*, 407 U.S. 493, n. 4, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) (opinion by Marshall, J.) (referring to the "same class" rule of some courts that the exclusion of a class from jury service is subject to challenge only by a member of the excluded class); Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599 (1962); Note, Standing to Assert Constitutional Jus Tertii, 88 Harv.L.Rev. 423 (1974).

We are not, however, bound by the justiciability doctrines of the federal system which derive from the Article III "case or controversy" requirement of the Constitutional and the prudential concerns which the Supreme Court has applied as "matters of judicial self-governance." *Warth vs Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); see Comment, 50 N.Y.U.L.Rev. 1163, 1171-73 (1975). Rather, we are obligated to apply our own standards of justiciability. Note, Protecting Fundamental Rights

in State Courts: Fitting a State Peg to a Federal Hole, 12 Harv.C.R.-C.L.L. Rev. 63, 90-93 (1977).

I would hold that here "the exclusion of a discernible class from jury service injures not only those defendants of the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross-section of the community," *Peters vs. Kiff*, *supra* 407 U.S. at 500, 92 S.Ct. at 2167 (opinion of Marshall, J.), that there exists in the instant case a sufficient nexus between the status of the claimant, his allegation, his legal interest, and his requested relief to permit his standing to assert a denial of the equal protection of the laws by our gender based exemption provision for jury duty. We have recently held that a primary objective of the standing doctrine is "to assure that there is a sufficient controversy between the parties [so] that the case will be adequately presented to the court . . . [for the] purpose of preventing parties from creating controversies in matters in which they are not involved and which do not directly affect them. . . ." *Ryder vs. County of St. Charles*, 552 S.W.2d 705, 707 (Mo.banc 1977). That objective has surely been met here.

I would then consider the substantive merits of the equal protection claim.

"To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig vs. Boren*, *supra*, 429 U.S. at 197, 97 S.Ct. at 457; see Johnston, Sex Discrimination and the Supreme Court 1971-1974, 49 N.Y.U.L.Rev. 617 (1974). Under that rule, I can find no valid justification for our gender based scheme, and would therefore hold that it denies defendant equal protection. See Note, *Taylor vs. Louisiana: Constitutional Implications for Missouri's Jury Exemption Provisions*, 20 St. Louis U.L.J. 159 (1975); Comment, 41 Mo.L.Rev., *supra*.

Supreme Court of the United States

No. 77-6067

BILLY DUREN,

Petitioner,

v.

MISSOURI

ON PETITION FOR WRIT OF CERTIORARI TO THE Supreme Court of the State of Missouri.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 1, 1978